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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 642 - 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

GERALD THOMAS,

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, BRIEF IN SUPPORT THEREOF AND MOTION.

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(2) The involved matters and things are of momentous public concern..... 18

(3) In the instant case (Opinion, R. 68-71) and In re 4145 Broadway Hotel Company, 100 Fed. 2nd, 7, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, In re 4145 Broadway Hotel Company, 117 Fed. 2nd, 639, the same court holds and In re 4145 Broadway Hotel Company, 124 Fed. 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the same matter and between the same parties is within the letter and spirit of the first clause of Rule 38, 5 (b) 19

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision 20

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. Case et al., v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 109..... 20

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction in bankruptcy after confirmation and consummation of the plan of reorganization. The interpretation in these respects of the federal statutes presents important questions of federal law which have not been, but should be, settled by this Honorable Court 20

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Respondents

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

Circuit Court of Appeals cases numbers 7888 and 7891 are both appeals from the one order of the District Court committing your petitioner to jail for contempt of court

(R. 46), the appeal in case number 7888 perfected in accordance with the Rules of Criminal Procedure (R. 27-31) and in case number 7891 in accordance with the rules of Civil Procedure (R. 47-49).

The District Court's order was not entered at the instance of the United States but upon petition of respondents Rossetter, McCord and Rosenthal, and neither the Attorney General nor anyone else representing the United States has ever appeared either as petitioner or moving party in the District Court or as appellee in the Circuit Court of Appeals. Accordingly, when we speak in this petition and in the supporting brief of "respondents" we refer to the respondents in case No. 7891.

By orders of January 15, 1942 (R. 65), the Circuit Court of Appeals consolidated cases Nos. 7888 and 7891 for hearing, directed that the records therein and in three related prior appeals by your petitioner (CCA Case Nos. 6696 and 6733, consolidated, *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd 7; CCA Case No. 7497, *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, cert. den'd. 313 U. S. 593; CCA Case No. 7763, *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821) stand as of record in both CCA case No. 7888 and CCA case No. 7891, and that in the latter two cases your petitioner be required to print only such parts of the records in the three related prior appeals as were not already printed in one or the other of the same. Accordingly, in the instant case (CCA Cases Nos. 7888 and 7891, consolidated) the only printed transcript of record is a single Transcript of Record of the records peculiar to Circuit Court of Appeals Cases Nos. 7888 and 7891. In the Circuit Court of Appeals this Transcript and the Transcripts of Record in the three prior appeals were

cited herein by all counsel as, respectively, "R. .....", "Trans. 6696, p. .....", "Trans. 7497, p. ....." and "Trans. 7763, p. .....". Very few copies of any of the three printed Transcripts of Record in the prior related appeals are now available.—Your Honors' grace if we seem to presume to anticipate favorable disposition of your petitioner's motion herewith (*post*), but, as it were of near necessity, counsel for petitioner similarly cites the above mentioned Transcripts of Record in this petition and in petitioner's supporting brief.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Your petitioner, F. Gerald Thomas seeks review and reversal of identical orders (R. 72-73) of the United States Circuit Court of Appeals for the Seventh Circuit entered July 18, 1942, rehearings denied December 4, 1942 (R. 105), in CCA Cases Nos. 7888 and 7891, consolidated, affirming an order of the District Court for the Northern District of Illinois, Eastern Division, entered December 1, 1941 (R. 46). The District Court's order sustained charges by respondents Rossetter, McCord and Rosenthal, "stock trustees," that **in 1941** your petitioner violated a temporary injunction order of the District Court entered May 26, 1938 (R. 52; Trans. 7497, p. 10), and therefore committed petitioner to the County Jail of Cook County, Illinois, for 90 days, for contempt of court.

4145 Broadway Hotel Company is a reorganized Illinois debtor corporation, the bankruptcy proceedings instituted Aug. 10, 1934 (R. 32). Plan of reorganization was confirmed March 7, 1935 (Trans. 7497, pp. 2-8). May 10, 1935, a reorganization Trust Agreement of May 1,

1935 (Trans. 7497, pp. 142-147), and the form of trust certificates thereunder were approved by the District Court and distribution according to the plan of reorganization ordered (Trans. 7497, p. 8). July 26, 1935, the receiver's final report was approved, his and his attorney's fees fixed and paid (R. 34) and the application for fees to be allowed other persons continued to September 16, 1935 (R. 34),—finally fixed November 18, 1935 (R. 34). Meanwhile, on July 29, 1935, respondents Rossetter and McCord and one Paul Steinbrecher (since deceased, and succeeded by respondent Rosenthal) took possession of the reorganized debtor corporation's property (Trans. 6696, p. 6, 9th line).

From November, 1935, when the last fees were fixed, to January 18, 1938 (See, Trans. 6696, p. 5, 8th line from bot.), there were no proceedings whatever in the bankruptcy case. But following your petitioner moving, January 24, 1938 (R. 34) for leave to intervene, on May 14, 1938 (R. 35), entry of final decree was set for June 15, 1938, and followed by orders of continuance of entry of final decree, the last of which (September 30, 1938, R. 36) continued the same generally.

To date the final decree in the bankruptcy case proper has not been entered.

In its order of March 7, 1935, confirming the plan of reorganization the District Court in terms, but your petitioner insists inconsistently with the plan of reorganization and the relevant provisions of the Bankruptcy Act, reserved a supervisory jurisdiction over the reorganization trustees, they to make annual reports to the District Court for the presumable ten-year life of the reorganization trust (Trans. 7497, p. 7, par. 17 and p. 8, par. 21).

April 15, 1938, your petitioner entered the third of three motions by your petitioner in the District Court for leave to file, this third time your petitioner's so-called second amended petition (R. 35). This proposed second amended petition was never reduced to record but the record otherwise shows its general nature (R. 35 and Trans. 6696, p. 3, 3rd par. and pp. 5-8), namely, that it sought to invoke the supposed powers of the District Court over the reorganization trustees by reason of the attempted reservations of jurisdiction in the order of March 7, 1935, confirming the plan of reorganization. May 23, 1938, the District Court denied petitioner leave to file this proposed second amended petition, on the ground, among others, that "the allegations in the second amended petition are not relevant to the acts and doings of the Trustees over whom [which] the court has retained jurisdiction" (R. 7-8, 2nd par.).

Meanwhile, on May 1, 1938, respondents Rossetter, McCord and Rosenthal filed a sworn petition (Trans. 6696, pp. 2-8) alleging that during the pendency of petitioner's motion of April 15, 1938, your petitioner mailed to stockholders a letter of April 27, 1938, copy attached to respondents' petition (Trans. 6696, pp. 5-8), and in that letter made charges against respondents **"similar to those contained in the second amended petition"** (Trans. 6696, p. 3, 3rd Par.), **the subject matter of the letter the same as petitioner's pending motion,** and that the mailing of the letter was "an affront and an insult to the court **while said litigation is pending and undisposed of";** and praying an order restraining petitioner until further order of the court from sending out any further communications or soliciting or accepting any powers of attorney from stockholders, and a rule on petitioner to show cause why he should not be held in contempt of

court for sending out the letter of April 27, 1938 (Trans. 6696, p. 4). May 5, 1938, a restraining order as so prayed by respondents was entered on the face **(no proofs taken)** of respondents' petition, your petitioner ordered to show cause within ten days why he should not be attached for contempt of court and the matter set for hearing May 23, 1938 (Trans. 6696, pp. 14-15). May 16, 1938 (Trans. 6696, pp. 8-13), your petitioner answered the rule under oath and denied substantially every allegation of respondents' petition except that he admitted the sending out of his letter of April 27, 1938 (Exhibit A, to respondents' petition, Trans. 6696, pp. 5-7).

May 23, 1938, **no evidence offered or received,** petitioner's motion for leave to file his proposed second amended petition was heard and denied (Trans. 6696, p. 57).

The above mentioned proceedings on May 23, 1938, are discussed and in part set out in the opinion, text and footnotes, of the Circuit Court of Appeals in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7. In view, however, of the vital importance of these proceedings of May 23, 1938 (Trans. 6696, pp. 62-67), and of petitioner's inability to furnish at this time multiple copies of the transcript in case No. 6696 (see petitioner's motion herewith, *post*), we print these proceedings in full under this same cover, page for page to preserve the page numbers of the same in Transcript 6696.

On May 23, 1938, the court, having denied or announced its decision to deny petitioner leave to intervene, stated that unless petitioner **was willing** to be enjoined from sending out communications to stockholders and from using his powers of attorney **pending appeal by petitioner from the order of May 23, 1938,** the court would attach

petitioner for contempt for sending out petitioner's letter of April 27, 1938. Petitioner inquiring whether petitioner could not appeal from such an injunction, **the court said that if the injunction could not be a consent order** the court would proceed with the contempt matter. On these premises petitioner did consent **to be so enjoined pending possible appeal from the order of May 23, 1938.** Thereupon counsel for respondents were directed by the court and undertook to draft an injunction order **"to that effect"** (Trans. 6696, pp. 64, 66, 67). The result was the order of injunction entered May 26, 1938 (R. 52; Trans. 7497, pp. 10-11; Trans. 6696, p. 17),—**the head and front of all subsequent litigation between the parties hereto.**

Your petitioner, due presumably to his then counsel's oversight, never did appeal from the order of May 23, 1938, denying him leave to file his proposed second amended petition; and time for such appeal expired at midnight June 22nd, 1938.

June 23, 1938, notice the preceding day, the court denied your petitioner leave to write shareholders (R. 36, first two lines) that (Trans. 6696, p. 33) the stockholders had not heard from petitioner since his letter of April 27, 1938, because the District Court had enjoined petitioner from communicating with other shareholders; that petitioner intended to appeal to the Circuit Court of Appeals and that until the matter was decided by that court petitioner would not be in a position to communicate with stockholders, but that petitioner was not dropping the matter.

February 14, 1939 (R. 36), petitioner petitioned the District Court to vacate or otherwise hold for nought the injunction of May 26, 1938, on the ground that it had expired at midnight June 22, 1938 (Trans. 7497, p.

11). **No evidence was offered,** but the petition was denied March 20, 1939, on the face of the record (R. 37), and leave to appeal denied by the Circuit Court of Appeals April 27, 1939. *In re 4145 Broadway Hotel Co.,* 130 Fed. 2nd, 487.

Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1939, whether to continue or discontinue the trust, your petitioner voted under his powers of attorney to discontinue the trust.—May 22, 1940, upon vote of stockholders required by the Trust Agreement (Article 3, Trans. 7497, pages 143, last three lines,-144, first 25 lines) whether to place a $110,000.00 mortgage on the Hotel Company's real estate, your petitioner voted under his powers of attorney against the placing of such mortgage.—June 15, 1940, pursuant to provision therefor in the Trust Agreement (Art. 6, Sec. 4, Trans. 7497, p. 145), by instrument in writing signed by your petitioner under his powers of attorney your petitioner in terms removed all of respondents as trustees.

By decretal order of August 6, 1940 (Trans. 7497, pp. 159-163; aff'd., *In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd, 639), the District Court held that the trust had not been terminated in the May 1, 1939, referendum, that the placing of the $110,000.00 mortgage had not been effectively dissented to in 1940 and that the trustees were not removed in 1940, **all on the ground that these acts of your petitioner in 1939 and 1940 to those ends were in violation of the injunction of May 26, 1938, and void.**

Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1941, whether the trust should be continued or discontinued, your petitioner participated by writing stockholders letters of March 15, 1941

(Trans. 7763, pp. 27-31), and April 5, 1941 (Trans. 7763, pp. 59-64), and by participating and aiding one Rose Mary King in sending out to stockholders over her name a circular letter of March 17, 1941 (Trans. 7763, p. 25).

These two letters of your petitioner dated March 15 and April 5, 1941, and his participation in the sending out of the Rose Mary King letter of March 17, 1941, are the acts of your petitioner for which he is now committed to the County Jail for ninety days **on the ground that these acts of petitioner in 1941 were in violation of the injunction of May 26, 1938** (Circuit Court of Appeals Opinion, R. 69, lines 2-12).

Basis of Contention of Jurisdiction to Review.

The judgment of the Circuit Court of Appeals review of which is sought are identical orders (R. 72-73) in CCA cases Nos. 7888 and 7891, consolidated, entered July 18, 1942, rehearing denied December 4, 1942 (R. 105). This Court has jurisdiction to grant petitioner the writ of *certiorari* under and pursuant to section 347 (a), Title 28, United States Code, with the same power and authority, and with like effect, as if the cause had been brought to this Court by unrestricted writ of error or appeal.

The Questions Presented.

(1) Was the injunctional order of May 26, 1938, a consent order (as held in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7) or, contrariwise, was the nominal consent of petitioner extorted by coercive threat by the District Court otherwise to attach petitioner for fanciful contempt in sending out petitioner's letter of April 27, 1938?

(2) Whether was or was not your petitioner coerced by the District Court in May, 1938, was the order of May 26, 1938, **as now construed by the District Court and the Circuit Court of Appeals** the order of injunction to which your petitioner consented?

(3) Is the nature, purpose and life of the injunction of May 26, 1938, to be determined from the whole record (as it was determined in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7), or from the bare face of the injunctional order itself (as it was determined in *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, Cert. den'd. 313 U. S. 593, and stated, by necessary implication, or assumed to be determinable in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487)?

(4) It appearing from the whole record that the injunction of May 26, 1938, was to preserve the *status quo* of the proceedings by petitioner for leave to intervene and enjoined petitioner only pending appeal or legal possibility of appeal by petitioner from the order of May 23, 1938 (as held in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7), your petitioner never having so appealed and legal possibility of such appeal having passed by operation of law at midnight, June 22, 1938, did the injunction at that hour expire or cease to operate as a restraint upon your petitioner, whether by operation of law or by the very terms of the order of injunction read in the light of the whole record? Or did that injunction remain in full force and effect, in the so-called discretion of the trial court, until expiration of the ten-year reorganization Trust Agreement or, or and, until the trial court got around to entering final decree in the case of *In re 4145 Broadway Hotel Company,* Debtor, instituted August 10, 1934, plan of reorganization confirmed March 7, 1935, and plan consummated at least by July 29, 1935?

(5) It appearing from the whole record that the injunction of May 26, 1938, was to preserve the *status quo* not of the bankruptcy proceedings proper but of the proceedings instituted by petitioner's motions for leave to file his proposed 2nd amended petition, and enjoined petitioner only pending actual appeal or legal possibility of appeal by petitioner from the order of May 23, 1938, was an order of the District Court necessary to bring the injunction to nought when no such appeal had ever been taken and legal possibility of such appeal had passed by operation of law at midnight June 22, 1938? If so, was it error for the District Court to deny (R. 37) the petitioner's petition of February 14, 1939 (R. 36), to vacate or hold the injunction for nought; or (as stated or assumed in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487) did it lie with the District Court in its so-called discretion, although its purpose **when entered** had been fully effected, to refuse to vacate or hold the injunction for nought?

(6) If the injunction of May 26, 1938, is construed as enjoining petitioner, subject only to the further order of the court, either (a) until entry of final decree in the bankruptcy proceeding proper or (b) until the termination of the reorganization trust, or until the demise without a legal successor of the reorganized debtor corporation, did the District Court err in entering or have jurisdiction to enter that injunction?

(7) Did the District Court err in decreeing or having jurisdiction to decree in its decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) that on August 6, 1940, the injunction order of May 26, 1938, had continued ever since May 26, 1938, and on August 6, 1940, remained in full force and effect?

(8) Did the District Court have jurisdiction to entertain respondents' petition of June 17, 1940 (Trans. 7497, p. 17), under either the provisions of the Trust Agreement of May 1, 1935 or under the attempted reservations of jurisdiction in the order confirming the plan of reorganization, or otherwise?

(9) Did the District Court err in decreeing or have jurisdiction to decree in its decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) that the proposed $110,000.00 mortgage had not been effectively dissented to, that the trust had not been terminated and that respondents had not been removed as trustees?

(10) Did the District Court have jurisdiction to entertain respondents' petition of April 18, 1941 (Trans. 7763, pp. 6-46), praying (Trans. 7763, pp. 16-17) that your petitioner be punished for contempt and, further, be permanently restrained from prosecuting petitioner's libel action in the State court?

(11) Did the District Court err in entering or have jurisdiction to enter its order of December 1, 1941 (R. 46)?

Reasons Relied on for Allowance of the Writ.

(1) The District Court's attachment of petitioner for contempt and the affirmance thereof by the Circuit Court of Appeals is denial to petitioner and violation of petitioner's guaranteed civil rights (R. 44, pars. numbered 14, 16, 17 and 18; Trans. 7497, pp. 63-64; Trans. 6696, p. 94; see also CCA Brief for Appellant herein, p. 8, last 6 lines, and pp. 3, last line—4, 1st line) to preserve which to all of us demands their preservation to each of us,—only the more so during possibly distracting global war for the rights and liberties of all men.

(2) The involved matters and things are of momentous public concern:

(a) Tho not parties hereto, the guaranteed civil rights of at least thirteen hundred individual stockholders, residents of 38 States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal are immediately involved.

(b) The history of this long drawn-out litigation is story of the use and abuse of processes of the federal courts and prostitution of the Bankruptcy Act to the ends of the vicious nation-wide House of Issue, Defaulted Bondholders' Committee racket (Securities and Exchange Commission Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library).

(c) The proper construction of the Bankruptcy Act is of course of first importance to the general public, and insofar as the questions raised touching the Bankruptcy Act are procedural, they are of only the wider public interest because apt more commonly to arise.

(3) In the instant case by implication (Opinion, R. 68-71) and in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, expressly, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, in *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, the same court holds, and in *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the

same matter and between the same parties is within the letter and spirit of Rule 38, 5 (b).

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision.

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. *Case et al.*, v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 109.

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction after confirmation of the plan of reorganization. The interpretation in these respects of the federal statute presents important questions of federal law which have not been, but should be, settled by this Honorable Court.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ or writs of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, full and complete transcript or transcripts of the record and all proceedings of that court herein, which were cases numbered and entitled in that court on its docket cases numbered 7888 and 7891 (consolidated for hearing), *In the Matter of 4145 Broadway Hotel Company, Debtor,* in case number 7888 *F. Gerald Thomas, appellant,* vs. *The United States of America, appellee,* in case number 7891, *F. Gerald Thomas, appellant,* vs. *George W. Rossetter, Jay C. McCord and Maurice A. Rosenthal, appellees;* that said judgments of that court (identical in said cases numbered 7888 and 7891) entered July 18, 1942, rehearings denied December 4, 1942 (R. 105), may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.

SUPPORTING BRIEF.

Reported Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals (R. 68-71) delivered on entry herein in cases numbers 7888 and 7891 of its identical judgments (R. 72-73) of July 18, 1942, is not as yet officially reported.

Companion and related cases between the same parties (listed chronologically) are reported, CCA Cases Nos. 6696 and 6733 as *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7; CCA Case No. 6932 as *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487; CCA Case No. 7497 as *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, cert. den'd. 313 U. S. 593, and CCA Case number 7763 as *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821.

Grounds of Invocation of This Court's Jurisdiction.

(1) The District Court's attachment of petitioner for contempt and the affirmance thereof by the Circuit Court of Appeals is denial to petitioner and violation of petitioner's guaranteed civil rights (R. 44, pars. numbered 14, 16, 17 and 18; Trans. 7497, pp. 63-64; Trans. 6696, p. 94; see also CCA Brief for Appellant herein, p. 8, last 6 lines, and pp. 3, last line,—4, 1st 2 lines) to preserve which to all of us demands their preservation to each of us,—only the more so during possibly distracting global war for the rights and liberties of all men.

The petition of respondents upon which the injunction of May 26, 1938 was entered (Trans. 6696, pp. 2-8) alleged no act of the petitioner as basis for the injunction except the mailing out by petitioner of his letter of April

27, 1938, pending petitioner's motion for leave to file his proposed 2nd amended petition (Trans. 6696, pp. 5-8), **and prayed no injunction whatever** (Trans. 6696, p. 4). Your petitioner's answer (Trans. 6696, pp. 8-13) denied substantially every allegation of that petition except the sending out his letter of April 27, 1938, which he admitted. At the hearing on May 23, 1938, **no evidence was offered or received** (Trans. 6696, pp. 62-67; reprinted *post*).

Respondent's petition of June 17, 1940 (Trans. 7497, pp. 17-27) on which it was decreed (Trans. 7497, p. 161, par. 9) that the injunction of May 26, 1938, was still in full force and effect, charged no acts of petitioner as of or prior to May 26, 1938, and prayed neither construction, continuance, extension or re-entry of the injunction of May 26, 1938 (Trans. 7497, p. 27); and on the hearing of that petition **no testimony was received or offered to any such end** (Trans. 7497, pp. 65-101).

So it was that your petitioner was never faced with charges that were or were supposed to be basis for any such injunction as the lower courts, in order to sustain commitment of your petitioner for contempt of court, now by misconstruction would make out the injunction of May 26, 1938 to have been.

As the lower courts would now construe the injunction of May 26, 1938, that injunction, neither *allegata* nor *probata* behind it, not only deprives petitioner of his personal liberty and steals his purse, his property rights, but robs him of his right of free speech,—either for the presumable ten-year life of the reorganization trust (Trans. 7497, par. 17, p. 7 and par 21, p. 8) or until the bankruptcy court, in its apparently uncontrolled discretion, gets around to entering final decree in the bankruptcy proceedings proper.

Illustrative of what this muzzling of petitioner involved at the hands of the District Court, June 23, 1938 (R. 36), his Honor Judge William H. Holly denied your petitioner leave to write his clients, holders of a majority (Trans. 7497, pp. 148-149), 6498 shares of stock of the reorganized debtor (Trans. 7497, p. 62), that they had not heard from petitioner because petitioner had been enjoined from communicating with other shareholders and that petitioner intended to appeal the matter to the United States Circuit Court of Appeals but that until it was decided by that court petitioner was not in a position to freely communicate with stockholders (Trans. 6696, p. 33, par. numbered 9th).

In the foregoing we are not unmindful that a victim may waive both *allegata* and *probata* by consent. But, as above presented, the "consent" of your petitioner was not a voluntary consent but was extorted from him by threat of his Honor William H. Holly that otherwise his Honor would attach your petitioner for fancied contempt of court in sending out his letter of April 27, 1938. And that consent was to the injunction of May 26, 1928, not to any such injunction as the lower courts, by shutting their eyes to the record herein and closing their ears to the established rules of law, would now make out that injunction to have been.

(2) The involved matters and things are of momentous public concern:

(a) Tho not parties hereto the guaranteed civil rights of at least thirteen hundred individual stockholders, residents of 38 states, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal are immediately involved.

(b) The history of this long drawn out litigation is story of the use and abuse of processes of the

federal courts and prostitution of the Bankruptcy Act to the ends of the vicious nation-wide House-of-Issue, Defaulted-Bondholders'-Committee racket (Securities and Exchange Commission Report on Study and Investigation of the Work Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library).

(c) The proper construction of the Bankruptcy Act is of course of first importance to the general public, and insofar as the questions raised touching the Bankruptcy Act are procedural, they are of only the wider public interest because apt more commonly to arise.

(3) In the instant case (Opinion, R. 68-71) and In re 4145 Broadway Hotel Company, 100 Fed. 2nd, 7, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, In re 4145 Broadway Hotel Company, 117 Fed. 2nd, 639, the same court holds and In re 4145 Broadway Hotel Company, 124 Fed. 2nd, 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the same matter and between the same parties is within the letter and spirit of the first clause of Rule 38, 5 (b).

True (Opinion, R. 70, last two lines; and Petition for Rehearing, R. 103, lines 15-24), the Circuit Court of Appeals, in defiance of the record (Trans. 6696, pp. 62-67, reprinted in full, *post*), misapplies the rule to support its erroneous conclusion that the clear purport of the injunction was to restrain petitioner from interfering "with the operation or execution of the plan as con-

firmed". To no human mind can such be said to be the purport, clear or otherwise, of the face of the order of May 26, 1938. The proof of that is mere matter of reading the order (Trans. 7497, pp. 10-11). It follows that the Circuit Court of Appeals itself relies on the whole record, for on no other basis under heaven can the purport of that order be determined, clearly or, as by the Circuit Court of Appeals in the instant case, erroneously.

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision.

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. Case et al., v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 109.

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction in bankruptcy after confirmation and consummation of the plan of reorganization. The interpretation in these respects of the federal statute presents important questions of federal law which have not been, but should be, settled by this Honorable Court.

In the instant case, and so far as we have been able to discover for the first time in history, the Circuit Court of Appeals actually holds (Opinion R. 7, last 7 lines)

that from the provision of Section 207, par. (h) that the plan of reorganization is to be put into effect "under and subject to the supervision and control of the judge" it follows that **after consummation of the plan** of reorganization the bankruptcy court continues to enjoy authority to enjoin any act by any one "inconsistent with or which will interfere with the **OPERATION** or execution of the plan as confirmed". The plan is executed when it is consummated and thereafter there is no plan but a new entity whose the operation is. If the bankruptcy court has control of that operation then the bankruptcy court has paternal control of a reorganized corporation for the existence of the corporation and of a reorganized individual debtor for his life.

STATEMENT OF THE CASE.

The Basic Case

4145 Broadway Hotel Company, is a reorganized Illinois debtor corporation, the bankruptcy proceedings instituted Aug. 10, 1934 (R. 32). Plan of reorganization was confirmed March 7, 1935 (Trans. 7497, pp. 2-8). May 10, 1935, a reorganization Trust Agreement of May 1, 1935 (Trans. 7497, pp. 142-147) and the form of trust certificates thereunder were approved by the District Court and distribution according to the plan of reorganization ordered (Trans. 7497, p. 8). July 26, 1935, the receiver's final report was approved, his and his attorney's fees fixed and paid (R. 34) and the application for fees to be allowed other persons continued to September 16, 1935 (R. 34),—finally fixed November 18, 1935 (R. 34). Meanwhile, on July 29, 1935, respondents Rossetter and McCord and one Paul Steinbrecher (since deceased, and succeeded by respondent Rosenthal), as reorganization trustees, took possession of the reorganized debtor corporation's property (see, Trans. 6696, p. 6, 9th line). In explanation, later

(Trans. 6696, p. 38, par. 11), of their delay in taking possession respondents stated that while the reorganization plan was confirmed March 7, 1935, "a great deal of work was required **to consummate the plan** and it was not until several months later that all of the legal details had been arranged and the Trustees were in a position **to take over the supervision of the property.**"

From November, 1935, when the last fees were fixed, to January 18, 1938 (see, Trans. 6696, p. 5, 8th line from bot.), there were no proceedings whatever in the bankruptcy case. But following your petitioner moving January 24, 1938 (R. 34), for leave to intervene on May 14, 1938 (R. 35), entry of final decree was set for June 15, 1938, and followed by orders of continuance of entry of final decree, the last of which (September 30, 1938, R. 36) continued the same generally.

To date the final decree in the bankruptcy case has not been entered.

Your Petitioner Your petitioner F. Gerald Thomas is a real estate broker and was a member of the Chicago Advisory Committee to the Congressional Select Committee to Investigate Bondholders' Reorganizations authorized by House Resolution 412, is himself a stockholder of 4145 Broadway Hotel Company and is general attorney in fact for a majority (Trans. 7497, pp. 148-149), 6,498 shares (Trans. 7497, p. 62), of 11,683 total outstanding shares of stock of the reorganized debtor corporation (Trans. 7497, p. 67). These outstanding 11,683 shares of stock are evidenced almost entirely by participating certificates issued under the reorganization Trust Agreement of May 1, 1935, and are owned by approximately 1300 individual residents of thirty-eight States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal.

Respondents—The House of Issue Respondents Rossetter, McCord and Rosenthal were and still claim to be trustees under the reorganization Trust Agreement and reorganization directors of the reorganized debtor corporation. The House of Issue of the bonds in exchange for which, under the reorganization plan, the outstanding 11,683 shares of stock of the reorganized company issued was S. W. Straus & Company (Trans. 7497, p. 78), succeeded upon the demise of that company by its subsidiary Securities Service Corporation. Respondents Rossetter and McCord and one Sidney H. Kahn (the latter a former officer of S. W. Straus & Co., Trans. 7497, p. 78) were S. W. Straus & Company's Bond Holders Committee, and held possession until the reorganization trustees took over. Following reorganization of the debtor corporation respondents Rossetter and McCord and one Paul Steinbrecher, since deceased, became stock trustees (Trans. 7497, p. 147). Upon Steinbrecher's death respondents Rossetter and McCord appointed respondent Rosenthal to fill the vacancy (Trans. 7497, p. 79). Steinbrecher, one of the original appointees, it so happened was not a member of the particular S. W. Straus & Company's Bond Holders Committee for this issue. Rosenthal is a former employee of S. W. Straus & Co., and today is president of Securities Service Corporation, which, to quote Mr. Rosenthal (Trans. 7497, p. 78), "was an outgrowth of S. W. Straus & Company," and commonly serves on managing committees and as secretary of bond holders' committees, "for the most part S. W. Straus & Company issues" (Trans. 7497, p. 78).*

* See, further, Securities and Exchange Commission Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library.

Attempted Reservations of Jurisdiction The order of March 7, 1935, confirming the plan of reorganization (your petitioner insists inconsistently with the plan of reorganization and the relevant provisions of the Bankruptcy Act) provided (Trans. 7497, pars. 17-18, p. 7 and par. 21, p. 8):

> "18. The Court hereby reserves jurisdiction over the trust to be created pursuant to the plan of reorganization and over the Trustees from time to time acting as Trustees under said Trust Agreement for the purpose of supervising the acts and doings of such Trustees and for the purpose in all respects of protecting and safeguarding the rights of the holders of the trust certificates from time to time outstanding, and reserves jurisdiction over the property in any and all matters involving said Trustees or the holders of said trust certificates. Said Trustees shall file annually a report showing the receipts and disbursements for each calendar year and shall periodically send or cause the debtor to send reports covering the **operations of the property** to all stockholders and certificate holders."
>
> "21. The Court reserves jurisdiction herein to enter such further orders as hereinafter may be deemed necessary and proper in connection with carrying out the terms and provisions of said plan of reorganization as amended and this order and terminating this cause."

Certain Provisions of the Trust Agreement The Trust Agreement of May 1, 1935, Article III (Trans. 7497, p. 19) provides:

> "If the Trustees in their sole discretion deem it advisable, they may, before or after submitting the terms of any proposed sale or mortgage to the Certificate Holders as hereinabove provided, request the approval to the terms of said proposed sale or mortgage of the court in the case entitled 'In the Matter of 4145 Broadway Hotel Company, a Corporation,

Debtor,' No. 56875, in the District Court of the United States for the Northern District of Illinois, Eastern Division, or if the Court be unable to act in said proceedings, then the approval of any court of competent jurisdiction; provided, however, that the submission of such sale or mortgage to said Court shall in no manner be construed as mandatory upon the Trustees."

Article 8, section 8, provides that certificate holders (stockholders) may take any action they are permitted to take under the Trust Agreement "in person or by attorney-in-fact appointed in writing" (Trans. 7497, p. 147).

Plan of Reorganization The plan of reorganization does not appear in full in the record herein in the Circuit Court of Appeals. In that court it was agreed by counsel, and in effect assented to by the Court of Appeals that the plan of reorganization be taken as before the court and that both counsel would make such statements touching the contents of the same as they deemed material, subject to dissent or correction in the brief of opposing counsel. Under this understanding no difference arose between counsel. However, for the possible convenience of this Honorable Court we print as an appendix to our brief the plan of reorganization as submitted to and adopted by the interested parties (Trans. 7497, p. 3, par. a).

The plan of reorganization contains no provision in terms authorizing or suggesting the attempted reservations of jurisdiction in the order confirming the plan of reorganization; and contemplates organization of a new corporation to operate the involved estate.

The sole basis for Article III of the Trust Agreement above presented to be found in the plan of reorganization is the following:

"The Trustees shall have the right to apply to any court of competent jurisdiction for its approval before completing any sale or mortgage of the property or before completing any sale of the stock held by them, but shall not be required to do so."

Petitioner's Motions for leave to intervene April 15, 1938, your petitioner entered the third of three motions by your petitioner in the District Court for leave to file, this third time your petitioner's so-called second amended petition (R. 35). This proposed second amended petition was never reduced to record but the record otherwise shows its general nature (R. 35 and Trans. 6696, p. 3, 3rd par. and pp. 5-8), namely, that it sought to invoke the supposed powers of the District Court over the reorganization trustees by reason of the attempted reservations of jurisdiction in the order of March 7, 1935, confirming the plan of reorganization, complained of the trustees' failure to take possession until July 29, 1935, of the trustees' failure to file annual reports until February 8, 1938 (R. 35), and of bad management of the estate by the trustees when they did take possession, and also sought (R. 34, last three lines) to reopen prior discharge by the District Court (R. 34, lines 13-16) of a State court receiver.

Order of May 23, 1938 May 23, 1938, **no evidence received or offered**, the District Court denied petitioner leave to file this proposed second amended petition, on the ground, among others, that "the allegations in the second amended petition are not relevant to the acts and doings of the Trustees over whom [which] the court has retained jurisdiction" (R. 7-8, 2nd par.).

First Contempt Proceedings against Petitioner Meanwhile, on May 1, 1938, respondents Rossetter, McCord and Rosenthal filed a sworn petition (Trans. 6696, pp.

2-8) alleging that during the pendency of petitioner's motion of April 15, 1938, your petitioner mailed to stockholders a letter of April 27, 1938, copy attached to respondents' petition (Trans. 6696, pp. 5-8), and in that letter made charges against respondents **"similar to those contained in the second amended petition"** (Trans. 6696, p. 3, 3rd Par.), **the subject matter of the letter the same as petitioner's pending motion,** and that the mailing of the letter was "an affront and an insult to the court **while said litigation is pending and undisposed of";** and praying an order restraining petitioner **until further order of the court** from sending out any further communications or soliciting or accepting any powers of attorney from stockholders, and a rule on petitioner to show cause why he should not be held in contempt of court for sending out the letter of April 27, 1938 (Trans. 6696, p. 4). May 5, 1938, a restraining order as so prayed by respondents was entered on the face **(no proofs taken)** of respondents' petition, your petitioner ordered to show cause within ten days why he should not be attached for contempt of court and the matter set for hearing May 23, 1938 (Trans. 6696, pp. 14-15).

May 16, 1938 (Trans. 6696, pp. 8-13), your petitioner answered the rule under oath and denied substantially every allegation of respondents' petition except that he admitted the sending out of his letter (Exhibit A, to respondents' petition, Trans. 6696, pp. 5-7) of April 27, 1938.

Entry of Injunction of May 26, 1938 On May 23, 1938, the court having denied or announced its decision to deny petitioner leave to intervene, his Honor stated that unless petitioner **was willing** to be enjoined from sending out communications to stockholders and from using his powers of attorney **pending appeal by petitioner from the order of May 23, 1938,** the court would attach petitioner

for contempt for sending out petitioner's letter of April 27, 1938. Petitioner inquiring whether petitioner could not appeal from such an injunction, **the court said that if the injunction could not be a consent order** the court would proceed with the contempt matter. On these premises petitioner did consent **to be enjoined pending possible appeal from the order of May 23, 1938.** Thereupon counsel for respondents were directed by the court and undertook to draft an injunction order **"to that effect"** (Trans. 6696, pp. 64, 66, 67). The result was the order of injunction entered May 26, 1938 (R. 52; Trans. 7497, pp. 10-11; Trans. 6696, p. 17),—**the head and front of all subsequent litigation between the parties hereto.**

Denial of Special Leave to Write Stockholders June 23, 1938, the court denied your petitioner leave to write shareholders (R. 36, first two lines) that (Trans. 6696, p. 33) the stockholders had not heard from petitioner since his letter of April 27, 1938, because the District Court had enjoined petitioner from communicating with other shareholders; that petitioner intended to appeal to the Circuit Court of Appeals and that until the matter was decided by that court petitioner would not be in a position to communicate with stockholders, but that petitioner was not dropping the matter.

Motion to Declare Injunction Ended February 14, 1939 (R. 36), petitioner petitioned the District Court to vacate or otherwise hold for nought the injunction of May 26, 1938, on the ground that it had expired at midnight June 22, 1938 (Trans. 7497, p. 11). **No evidence was offered,** but the petition was denied March 20, 1939, on the face of the record (R. 37); leave to appeal denied by the Circuit Court of Appeals April 27, 1939. *In re 4145 Broadway Hotel Co.,* 130 Fed. 2nd, 487.

Referendum of May 1, 1939 Upon referendum under the Trust Agreement (Trans. 7497, p. 146), as of May 1, 1939, whether to continue or discontinue the trust, your petitioner voted under his powers of attorney to discontinue the trust (Trans. 7497, pp. 131-140).

Dissent to Mortgage, May 22, 1940 May 22, 1940, upon vote of stockholders required by the Trust Agreement (Article 3, Trans. 7497, pages 143, last three lines,-144, first 25 lines) whether to place a $110,-000.00 mortgage on the Hotel Company's real estate, your petitioner voted under his powers of attorney against the placing of such mortgage (Trans. 7497, pp. 104-105).

Removal of Trustees, June, 1940 June 15, 1940, pursuant to provision therefor in the Trust Agreement (Art. 6, Sec. 4, Trans. 7497, p. 145), by instrument in writing signed by your petitioner under his powers of attorney your petitioner in terms removed all of respondents as trustees (Trans. 7497, pp. 148-149).

Decree of August 6, 1940 By decretal order of August 6, 1940 (Trans. 7497, pp. 159-163; aff'd., *In re 4145 Broadway Hotel Co.*, 117 Fed. 2nd, 639), the District Court held that the trust had not been terminated in the May 1, 1939, referendum, that the placing of the $110,000.00 mortgage had not been effectively dissented to in 1940 and that the trustees were not removed in 1940, **all on the ground that these acts of your petitioner in 1939 and 1940 to those ends were in violation of the injunction of May 26, 1938, and void.**

Referendum of May 1, 1941 Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1941, whether the trust should be continued or discontinued, your petitioner participated by writing

stockholders letters of March 15, 1941 (Trans. 7763, pp. 27-31) and April 5, 1941 (Trans. 7763, pp. 59-64), and by participating and aiding one Rose Mary King in sending out to stockholders over her name a circular letter of March 17, 1941 (Trans. 7763, p. 25).

Acts for Which Petitioner Is Committed to Jail These two letters of your petitioner dated March 15, and April 5, 1941, and his participation in the sending out of the Rose Mary King letter of March 17, 1941, are the acts of your petitioner for which he is now committed to the County Jail for ninety days **on the ground that these acts of petitioner in 1941 were in violation of the injunction of May 26, 1938** (Circuit Court of Appeals Opinion, R. 69, lines 2-12; Trans 7763, pp. 8, 9, 14-15, 27, 59).

The Red Herring The Circuit Court of Appeals' "the sordid history of this reorganization matter" (Opinion, R. 69) is re-echo of the mud slinging to which your petitioner has been subjected throughout this whole litigation, well illustrated by charge **by respondents** that your petitioner obtained his powers of attorney by "misrepresentation". On second appeal (*In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd, 639, 641) the Court of Appeals said that it found "ample evidence in the record to sustain" this charge.

No provision of the Trust agreement makes these stock trustees guardians of or responsible for the dealings of stockholders with each other, and no one but respondents, no stockholder who had given power of attorney to your petitioner ever so charged or complained.

And no color of proof appeared in the record that any material representation was (1) false, (2) was known to

your petitioner to be false, (3) was made by petitioner with intent to deceive or (4) ever deceived or was relied upon by any stockholder. In the instant case we for the second time challenged respondents, and now again challenge respondents to show otherwise from the record (CCA Reply Brief for Appellant, p. 4); and in our petition for rehearing to the Circuit Court of Appeals urged that respondents never having responded to our challenge the Circuit Court of Appeals should not now repeat or by implication adopt any such statement without itself taking up your petitioner's glove (petition for rehearing, R. 87, par. 1).

Errors to be Urged.

We urge that the trial court erred in the following respects, in most instances for, among other reasons, lack of jurisdiction, and that the Circuit Court of Appeals erred in approving and affirming the errors of the trial court, the trial court erring:

(1) In coercing your petitioner to consent to the entry, May 26, 1938, of any injunction of your petitioner.

(2) In entering the injunctional order of May 26, 1938, properly construed.

(3) In construing the injunction of May 26, 1938, as now construed by both the District Court and the Circuit Court of Appeals and holding that so construed the District Court had jurisdiction to enter same.

(4) In now holding that petitioner consented to an injunction in terms and effect as the injunction of May 26, 1938, is now construed by the District Court and by the Circuit Court of Appeals.

(5) In holding that the nature, purpose and life of the injunction of May 26, 1938 is not to be determined from the whole record.

(6) In not holding that the injunction of May 26, 1938, was to preserve the *status quo* of the proceedings by petitioner for leave to intervene, and enjoined petitioner only pending appeal or legal possibility of appeal by petitioner from the order of May 23, 1938.

(7) In not holding that petitioner never having appealed from the order of May 23, 1938, and legal possibility of such appeal having passed by operation of law at midnight, June 22, 1938, the injunction of May 26, 1938, at that hour expired and ceased to operate as a restraint upon petitioner, whether so by operation of law or by the very terms of the order of injunction properly read in the light of the whole record.

(8) In not holding that the injunction of May 26, 1938, expired at midnight June 22, 1938, without order to that effect by any court.

(9) In refusing to grant petitioner's petition of February 14, 1939, and to vacate or hold the injunction of May 26, 1938 for nought as prayed by petitioner.

(10) In holding and decreeing in the decretal order of August 6, 1940, or at any other time, that the injunction of May 26, 1938, continued in force after June 22, 1938, and was in full force and effect on August 6, 1940, or at any other time after June 22, 1938.

(11) In entertaining respondents' petition of June 17, 1940.

(12) In holding and decreeing August 6, 1940, or at any other time that the proposed $110,000.00 mortgage had not been therefore effectively dissented to, that the reorganization trust had not been terminated and that respondents had not been removed as reorganization trustees.

(13) In entertaining respondents' petition of April 18, 1941, praying that your petitioner be punished for contempt and, further, be permanently restrained from prosecuting petitioner's libel action in the State court.

(14) The District Court in including in the order confirming the plan of reorganization the provisions of that order, paragraphs numbered 18 and 21 thereof, in terms "reserving" jurisdiction in the premises not provided for or contemplated in and inconsistent with the plan of reorganization and contrary to and in violation of the Bankruptcy Act; and the Circuit Court of Appeals in not holding that those attempted "reservations" are void and of no effect.

(15) In that both the District Court and the Circuit Court of Appeals have denied your petitioner his guaranteed civil rights of personal liberty, of property and freedom of speech and otherwise denied your petitioner his constitutional rights to due process of law.

(16) In that the District Court has not long since entered final decree in the bankruptcy proceedings proper.

(17) The District Court in entering, the Circuit Court of Appeals in affirming the District Court's order of December 1, 1941 (R. 46).

Summary.

Representation of both Debtor and Bondholders Committee by the same counsel, now counsel for respondents (see Trans. 6696, p. 66, last 16 lines) and the attempted "reservation" (save the mark!) of life-time guardianship of the reorganization trustees, creatures * of the House of Issue, are foreword of the subsequent "sordid history of this reorganization matter" (Opinion, R. 69,

* Report of Securities & Exchange Commission, Part 3, particularly pages 148-149.

lines 16 and 17 from bot.) and this case's opening contribution to the current rechristening of the "Bondholders' Committee racket" by the man in the street as "Bondholders-Committee-Receivership racket".

From and after the fixing of fees in November, 1935 (R. 34), to date, all involved proceedings have been matter of struggle of your petitioner to protect and enforce rights of stockholders under the plan of reorganization and reorganization Trust Agreement, at first by invoking, illadvisedly but in entire good faith, the supposed powers of the District Court in terms reserved to the court in its order of March 7, 1935 (Trans. 7497, par. 17, p. 7, and par. 21, p. 8), confirming the plan of reorganization, and sometimes by exercising stockholders' rights, especially (Trust Agreement, Art. 6, Sec. 4, Trans. 7497, p. 145; Art. 8, Sec. 8, Trans. 7497, p. 147) to remove trustees and (Trust Agreement, Art. 7, Trans. 7497, pp. 146-147; Art. 8, Sec. 8, Trans. 7497, p. 147) to terminate the trust; and, on the other hand, matter of efforts of respondents and the District Court (by coercion and otherwise, and in violation, so your petitioner insists, of the Plan of Reorganization, the Trust Agreement, the Bankruptcy Act (R. 44) and the guaranteed civil rights of your petitioner and other stockholders to sustain wrongful acts of respondents in the premises and to perpetuate the trust and respondents as trustees and, consequently, as directors of the reorganized debtor corporation.

The plan of reorganization is confirmed March 7, 1935, Trust Agreement and trust certificates approved and all details of the bankruptcy proceedings proper disposed of by November 18, 1935 (*supra* pp. 3-4). From then to January 18, 1938, there are no proceedings whatever in the bankruptcy case itself. But your petitioner, January

24, 1938 (*supra* p. 4), moves for leave to intervene and while this and successive like motions are pending, on May 14, 1938, the sleeping giant stirs and entry of final decree in the bankruptcy proceedings is set for June 15, 1938, is followed by orders of continuance of entry of the final decree the last of which (Sept. 30, 1938) continues the same generally (*supra* p. 4).—Whether the sleepers stirred from nervousness or someone got the notion that the entry of final decree would be one way to get rid of the proposed Thomas petition but later decided that to leave the sanctuary was too big a price for respondents to pay does not appear expressly on the record; but at all events no final decree is or ever has been entered.

Your petitioner's third motion still pending, on May 5, 1938, the District Court enjoins petitioner from criticizing the trustees by letter to his fellow stockholders.—A stockholder has **no rights out of court.**

May 23, 1938, the plan of reorganization of the debtor having been long since confirmed and consummated, the District Court, in spite of its attempted reservation of an indefinitely continuing guardianship of the trustees, refuses to permit your petitioner to complain of the trustees **even to the court.** This, on the ground, among others, that petitioner's would-be complaints are not within the jurisdiction of the Bankruptcy Court in terms reserved in the order of confirmation. Under its so-called reservation, the court is creche not reform school for the trustees.—The reasons be what they may, a stockholder **has no rights in court.**

Petitioner declaring that he will appeal from that refusal, the Bankruptcy Court manhandles him—coerces him by threat otherwise to attach him for fancied con-

tempt of court, to consent to be enjoined **pending such possible appeal** from communicating with his fellow stockholders or using his powers of attorney from stockholders. —This manhandling of petitioner by the court is keystone of the subsequent continued "sordid history of this reorganization matter; (Opinion R. 69, lines 16 and 17 from bot.).

Petitioner never does so appeal and legal possibility of his doing so ends at midnight June 22, 1938; but petitioner does appeal from the injunction of May 26, 1938. The Court of Appeals holds (1) that petitioner's consent to the injunction was not coerced, the record clearly to the contrary notwithstanding, (2) that **on the whole record** the injunction restrained petitioner merely "as a litigant" pending appeal by petitioner from the order of May 23, 1938, refusing to let petitioner become a litigant, and (3) that **such being the nature of the injunction** the District Court had jurisdiction to enter the same. *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7.

The time for appeal by petitioner from the order of May 23, 1938, closing the court's doors in petitioner's face having expired at midnight June 22, 1938, petitioner, out of abundance of caution, petitions the trial court to spread of record the demise of the injunction entered to preserve the *status quo* pending the appeal that was never taken. The trial court denies this petition,—refuses to inter the order of injunction. Petitioner petitions the Court of Appeals to reverse this refusal, and that court denies leave to appeal on the ground, in effect, that it is discretionary with the District Court whether or not to recognize that the demised injunction is dead. *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd (April 27, 1939) 487.

The dead being dead tho not interred, the expressions of the Circuit Court of Appeals of April 27, 1939, in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487, not being an adjudication but refusal to adjudicate, and the Circuit Court of Appeals having solemnly declared in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, 10, that it was "not passing upon the right of the appellant, or any other certificate holder, to take any proper action in the future which is authorized by the terms of the trust agreement", your petitioner on referendum as of May 1, 1939, held under and in accordance with the terms of the Trust Argeement, votes under his powers of attorney for termination of the trust. Thereby, if his votes are counted, the trust is terminated as of May 1, 1939.

Again pursuant to and in accordance with the provisions of the Trust Agreement, your petitioner on May 22, 1940, votes over a third of the outstanding stock in dissent to the placing of a $110,000.00 mortgage on the reorganized company's property. Thereby, if his votes are counted, the placing of that mortgage is defeated.

Again pursuant to and in accordance with the provisions of the Trust Agreement, on June 15, 1940, your petitioner files with the trustees declaration and demand by over 51% of all outstanding shares of stock removing the trustees. Thereby, if his voice and through him the voices of his principals are heard and heeded, the trustees are removed as of June 15, 1940.

Then by petition of June 17, 1940 (Trans. 7497, pp. 17-27), respondents herein raise to the court a Macedonian cry for help; and by decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) the District Court, his Honor William H. Holly, judge presiding, finds and holds that

the injunction of May 26, 1938, is still in full force and effect (as it were, that by refusing March 20, 1939, to bury the deceased injunction the court raised it from the dead), and **on this premise** his Honor holds that the supposed mortgage has not been effectively dissented to, that the trust has not been terminated and that the trustees have not been removed.

Like the Psalms, this "sordid" story reaches its climax in the middle.

No one better knew than the District Court, his Honor William H. Holly, judge presiding, that the injunction of May 26, 1938, was only to preserve the *status quo* of the Thomas proceedings, not of the bankruptcy proceedings proper, and only pending possible appeal by your petitioner from the order of May 23, 1938, and that such was the only injunction your petitioner's consent to which his Honor successfully coerced. No one better knew than the District Court, his Honor William H. Holly, judge presiding, what the deal between the court and petitioner on May 23, 1938, really was. The climactic breach of faith by the court on August 6, 1940, in holding that injunction still in full force and effect is perhaps the most sordid incident in the "sordid history of this reorganization matter" (Opinion, R. 69, lines 16 and 17 from bot.).

For a time all had been quiet on the front.—Then February 28, 1941 (Trans. 7763, pp. 18-21), respondents write advisingly and persuasively to stockholders touching referendum as of May 1, 1141, to determine whether the trust shall continue for another two years or terminate as of May 1, 1941 (Trans. 7763, p. 8, par. 3).—Your petitioner replies (his letter to stockholders of March 15, 1941 Trans. 7763, pp. 27-30), and participates

and contributes to the sending out to the stockholders of the King letter of March 17, 1941 (Trans. 7763, p. 25).—Respondents, evidently feeling that if the trust is to be continued, the stockholders need stronger drink, on March 24, 1941 (Trans. 7763, pp. 31-37), take calf rope again circularize stockholders and by enclosure recommended to their consideration (Trans. 7763, p. 35, last 7 lines—page 37, first 6 lines) charge that your petitioner is "a cheat and a liar" and "dishonest", and in open court was unanimously declared so to be by three judges of the United States Circuit Court of Appeals "appointed by the President of the U. S."—April 4, 1941 (Trans. 7763, p. 14, par. 14) your petitioner brings suit in the State court, Cook County, Illinois, against respondents for libel.—Respondents cut to the cover of the arms of the District Court, his Honor William H. Holly, judge presiding. By petition of April 18, 1941 (Trans. 7763, pp. 6-46) they pray (Trans. 7763, pp. 16-17) that your petitioner be punished for contempt and, further, be **permanently** restrained from prosecuting petitioner's libel action in the State court.

The mere pendency of the petition of April 18, 1941, was Sword of Damocles to further exercise of petitioner's rights anent the referendum as of May 1, 1938; but remained to State court action for libel. That was neatly pocketed on June 2, 1941 (Trans. 7763, p. 96) by the third injunction of petitioner restraining him "until further order of this court" from prosecuting his State court action for libel,—his Honor Wm. H. Holly stating that he entered this third injunction without knowing whether he had any authority to do so or not (Trans. 7763, p. 72, lines 16-17), but would "take a chance and enter the order" (Trans. 7763, p. 72, lines 19-20). Altho his Honor said (Trans. 7763, p. 72, lines 4-5) that all he wanted was that the libel action "stay in *status quo*

until I [he] can pass upon the questions that are presented" (meaning presented by the petition **permanently** to enjoin your petitioner from prosecuting the State court action for libel), in spite of that assurance your petitioner was moved, *mirable dictu,* to appeal, and at long last got the first break. *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821.

But December 1, 1941 (R. 46) comes petitioner's jail sentence, affirmed by the Circuit Court of Appeals July 18, 1942, petition for rehearing filed September 25, 1942 (R. 83), rehearing denied December 4, 1942 (R. 105).

ARGUMENT.

I.

This Honorable Court is not bound by any of the prior decisions herein of the Court of Appeals.

As observed by the Circuit Court of Appeals for the First Circuit, any decision of a Court of Appeals "stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our [the Court of Appeals'] law of the case". *White* v. *Higgins,* 116 Fed. 2nd, 312, 317.

This Honorable Court has power now to do complete justice in the premises to your petitioner.

II.

Lack of jurisdiction of the subject matter can never be waived.

As will further appear, with few if any exceptions the questions presented involve, either primarily or in the alternative, issue as to the trial court's jurisdiction of the subject matter.

Consent of the parties will not confer jurisdiction of the subject matter. *Nixon* v. *Michaels,* 38 Fed. 2nd, (8th CCA), 420, 423; *Chicago Portrait Co.* v. *Chicago Crayon Co.,* 217 Ill. 200, 202; *Kneisel* v. *Ursus Motor Co.,* 323 Ill. 452. Tho the question was not raised below, it is the duty of the reviewing Court to determine the trial court's jurisdiction. *Nixon* v. *Michaels,* 38 Fed. 2nd, (CCA 8) 420, 423. The principles of law and rules of practice

are the same tho the lack of jurisdiction of a lower reviewing court (as, in the instant case, the Court of Appeals) turns upon lack of jurisdiction in the *nisi prius* court. *Kneisel* v. *Ursus Motor Co.*, 323 Ill. 452, 453, 458; *Chicago Portrait Co.* v. *Chicago Crayon Co.*, 217 Ill. 200, 202. Jurisdiction of the subject matter is conferred by law, not by erroneous assumption or decision of the court. *Smith* v. *Herdlicka*, 323 Ill. 585, 590. *O'Brien* v. *People*, 216 Ill. 354, 363. So of the implied adjudication of jurisdiction necessarily incident to assumption of jurisdiction to enter a void judgment or order. *Soldiers Creek Drainage District* v. *I. C. R. R. Co.*, 323 Ill. 350, 358. *People* v. *Swearengen*, 273 Ill. 630, 641, 642. Erroneous determination by the court that it has jurisdiction is not to be confused with determination by the court. *Chicago Title & Trust Co.* v. *Storage Co.*, 260 Ill. 485, 495. *Gardner* v. *Maroney*, 95 Ill. 552, 560.

And the right to question a judgment or order for want of jurisdiction of the subject matter is not limited or restricted by rules touching rights of appeal or writ of error. *Bell* v. *Mattoon Waterworks, etc., Reservoir Co.*, 235 Ill. 218, 219. *Buckmaster* v. *Carlins*, 4 Ill. 104, 108, 110.

III.

The claimed consent of your petitioner to the injunction of May 26, 1938, and whether that injunction was as contended by your petitioner or as subsequently erroneously construed by the lower courts is nullified by the facts of record.

On the first appeal, where alone the question was discussed, the Circuit Court of Appeals disposed of the issue with the statement (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 9, par. 5) that "it is as plausible to

argue that the District Court was induced to refrain from entering an order imposing a contempt penalty by appellant's representation that there would be no appeal from the order of injunction, as it is to insist that appellant was coerced into consenting to the injunctive order by the court's threat to impose a penalty for contempt".

What actually occurred on May 23, 1938? The District Court, his Honor William H. Holly, judge presiding, said that to send out petitioner's letter of April 27, 1938, at a time when petitioner's motion for leave to file his proposed second amended petition was pending was distinctly contempt of the District Court (Trans. 6696, p. 63, 3rd from last par); that the court did not want to enforce any penalty for contempt of court but that if "this sort of thing is to continue" the court would "have to take appropriate action for what has been done", but that if petitioner was willing that injunction be entered the court would not be inclined to punish for what has been done (Trans. 6696, p. 64, 3rd and 4th pars). Petitioner asked whether he could appeal from the restraining order and his attorney assured him that he could (Trans. 6696, p. 64, last 2 lines; *post,* 76). His Honor reiterated that if necessary he would impose a penalty "for what has been done" but if injunction be entered he "would be inclined to overlook what has been done". Petitioner's attorney suggested to his Honor that petitioner had a right to appeal from such restraining order (Trans. 6696, p. 65, first 4 pars.; *post,* 76). His Honor said that he wished to know whether there is a consent and that if petitioner didn't want to agree, **"if it cannot be a consent order, we will proceed on the contempt matter"** (Trans. 6696, p. 66, 1st and 15th pars). And when the court gave instructions for the order he

said (Trans. 6696, p. 67, 5th and last pars.), "Draw a consent order to that effect. * * * Prepare a consent decree and I will forego the contempt".

It was never suggested at the hearing, to use the language of the Circuit Court of Appeals (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 9, par. 5), "that there would be no appeal from the order of injunction". What did occur was that from the first the court was threatening petitioner with attachment for fancied prior contempt in sending out petitioner's letter of April 27, 1938, unless petitioner would agree to being enjoined and that when it was suggested that petitioner might appeal from such injunction the court threatened petitioner with attachment for the fancied previous contempt unless petitioner agreed that the order of injunction should on its face be a consent order. The net of which is that petitioner was coerced into agreeing to entry of an order of injunction and coerced into agreeing that it should appear on the face of the order that it was a consent order.

As will more and more appear herein, some parts of "the sordid history of this reorganization matter" (Opinion, R. 69, 17th line from bot.) consists of recurring almost astonishing disregard by the lower courts of the actual record.

IV.

The injunction of May 26, 1938, constrained petitioner only while appeal from the order of May 23, 1938, was possible; and expired at midnight June 22, 1938.

This injunction order is to be construed not from its mere face but from its occasion and purpose at the time of its entry as appearing from the whole record. *In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 8. *Camille, Inc.* v. *D. W. Fitch Co.*, 30 Fed. Supp. 532, 533. *Local Draft Board No. 1, etc., et al.* v. *Connors* (CCA 9), 124 Fed. 2nd, 388, 390. The Circuit Court of Appeals was absolutely correct in holding on the first appeal (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, and footnotes) the whole record should be considered and that the injunction constrain your petitioner only pending possibility of appeal from the order against him of May 23, 1938. This is further and conclusively established by the record herein of the proceedings of May 23, 1938 (Trans. 6696, p. 64, lines 23-28, 38-41; p. 65, lines 22-24, 35-41; p. 66, last 3 lines; p. 67, lines 5-14, and last 3 lines).

Possibility of appeal by petitioner from the order of May 23, 1938, denying him leave to file his proposed second amended petition expired at midnight June 22, 1938, by operation of law. A temporary injunction expires by mere passage of the occasion for its entry or fulfillment of its initial purpose, and then without any order whatever of the court which entered the same; and refusal under such circumstances formally to vacate or otherwise make of record the fact of termination of such an injunction is to be presumed to have been on the ground that such vacation or declaration of record was needless. *Sweeney* v. *Hanley*, 126 Fed. (.... CCA) 97, 99; cert. den. 183 U. S. 700.

V.

As construed by the District Court and, except on the first appeal, by the Circuit Court of Appeals, the District Court was without jurisdiction to award the injunction of May 26, 1938.

It is unquestioned and never has been questioned by respondents, by the District Court or by the Circuit Court of Appeals that the injunction of May 23, 1938, is a temporary injunction, an injunction *pendente lite.* The *lis pendens* pending which your petitioner was temporarily enjoined was what we call for convenience the Thomas proceedings, that is your petitioner's motion (his two prior motions no longer pending but already finally disposed of) for leave to file his proposed second amended petition. If, as petitioner insists, such was the *lis pendens* pending which your petitioner was enjoined, it is self-evident that when that *lis* ceased to be pending the injunction *pendenting* that *lis* ceased to be operative the moment there was no longer any such *lis* pending for the injunction to operate upon. This is perfectly clear if the injunction order is written and read in the light of the whole record. So expanded it reads that thereby your petitioner, his agents, attorneys and employees, be and each of them is, enjoined and restrained until the further order of this Court **pending possibility of appeal by your petitioner from the order of May 23, 1938, denying your petitioner leave to file his proposed second amended petition.** And so read, as petitioner insists it must be read, *by its own terms* it expired at midnight on June 22, 1938, your petitioner having taken no such appeal and the legal possibility of any such appeal by petitioner having passed at midnight June 22, 1938.

To meet this, respondents and the lower courts project into the picture a claimed second and a claimed third *lis pendens,* (1) the bankruptcy proceedings proper (no final decree having been entered therein), and (2) the matter of the reorganization trust of May 1, 1935 (jurisdiction of the same having been "reserved" in the order of confirmation).

On the three-*lis-pendens* theory, the contention is (Opinion, R. 70) that until final decree was entered in the bankruptcy proceedings proper the District Court **had jurisdiction** to enjoin petitioner in terms of the injunction of May 26, 1938, **until the final decree was entered** in the bankruptcy proceedings proper; and that until expiration of the trust evidenced by the Trust Agreement of May 1, 1935, the District Court **had jurisdiction** to enjoin petitioner in terms of the injunction of May 26, 1938, **until expiration of that trust.**

"Moreover" (Opinion, R. 70, 7th from last line), in the instant case the Court of Appeals raises still another question of **jurisdiction.** Having already declared that the District Court had jurisdiction so to enjoin your petitioner so long as no final decree had been entered in the bankruptcy proceedings proper and so long as the reorganization trust continued to exist (Opinion, R. 70)), the Court of Appeals holds (Opinion, R. 70, lines 2-7 from bot.) that independently of entry of final decree or continued existence of the reorganization trust, the District Court had jurisdiction under Section 207, 11 U.S.C.A., paragraph (h) as long (so it would seem) as the business of the new reorganization entity (whether a new corporation or the debtor corporation reorganized, as the case might be) remained in "operation"!—Having so just held, the Court of Appeals further holds

that the injunction of May 26, 1938, was entered in exercise of this asserted jurisdiction under paragraph (h) of Section 207, the court saying (Opinion, R. 70, last 2 lines), "This is the clear purport of the order of May 26, 1938".

Under our immediate heading (Our Point VI, *supra* page 47) we are, as there stated, presenting the question of the jurisdiction or lack of jurisdiction of the District Court on May 26, 1938, to enjoin your petitioner in terms of the face of the injunction of that date except for and during the pendency of the Thomas proceeding, that is, as it turned out, until midnight June 22, 1938, when your petitioner's right of appeal from the order of May 23, 1938, refusing him leave to file his proposed second amended petition expired by statutory limitation without his having taken such appeal. Our position is that if, as claimed by respondents and held by the Circuit Court of Appeals, the injunction is construed (as we would put it, misconstrued) as restraining your petitioner after midnight June 22, 1938, when the Thomas proceedings ceased to be pending, the District Court was without jurisdiction to award the injunction and the injunction was void *ab initio*.

The questions of proper construction of the order of injunction and of the jurisdiction of the District Court on May 26, 1938, are closely interrelated,—so closely interrelated that it is difficult to discuss the one without being led into discussion with the other. We presently take up the Circuit Court of Appeals' three supposed grounds of jurisdiction in the District Court on May 26, 1938, to award an injunction in terms and purport as the injunction of May 26, 1938, is misconstrued by the lower courts to have been. First, however, possibly at the price of digressing, the Court of Appeals holding

(Opinion, R. 70, last 2 lines) that "the clear purport of the order of May 26, 1938" is that it was exercise by the District Court of its jurisdiction under Section 207, paragraph (h).

VI.

The order of injunction of May 26, 1938, does not purport on its face or appear from the record aliunde its face to have been entered in exercise of claimed jurisdiction under 11 U.S.C.A., Section 207, paragraph (h).

The Court of Appeals (Opinion, R. 70) intimates that the District Court might have entered the injunction as misconstrued by respondent and the lower courts under its residue of jurisdiction because the final decree had not been entered, or might have entered it under its supposed jurisdiction by virtue of the attempted reservation of jurisdiction in the order confirming the plan of reorganization, but actually holds that its entry was exercise of jurisdiction under paragraph (h) of Section 207. The Court of Appeals rests this holding on what it says (Opinion, R. 70, last 2 lines) "is the clear purport of the order of May 26, 1938". In fact there is absolutely nothing on the face of that order indicating or purporting anything of the kind. It follows that in stating that such is the purport of the order of May 26, 1938, the Court of Appeals must of necessity be alluding to and relying upon matters of record *aliunde* the order of May 26, 1938. (It is for that reason that we elsewhere present and contend that in its opinion herein the Court of Appeals in effect holds that the purpose and effect, the purport of that order is properly to be determined from the whole record.) But the Court of Appeals to the contrary notwithstanding, absolutely nothing of the kind is to be found in the

record. The issue being raised by respondent and entertained by the lower court as to whether the injunction order was entered in the Thomas proceedings or, final decree not having been entered, in the bankruptcy proceedings proper or under the attempted reservations of jurisdiction in the order confirming the reorganization, or, as now for the first time in the history of the litigation presented, one only need to read the order of May 26, 1938 (Trans. 7497, pp. 10-11; same order Trans. 6696, pp. 17-18) to know that, willy-nilly, to determine the nature, purpose, effect and purport of that order resort must be had to the record *aliunde* the face of that order. And the record *aliunde* the face of the order is conclusive (*supra* page 43).—In other words the Court of Appeals holding that the order of May 26, 1938, was entered under and pursuant to paragraph (h) of Section 207 is just wishful thinking. What the Court of Appeals really does is ignore the record (Proceedings of May 23, 1938, Trans. 6696, pp. 62-67; reprinted, *post*), make a guess that the order was entered under paragraph (h) of section 207 and then determine "the clear purport of the order of May 26, 1938," on the assumption that the court has guessed right and that since the order was entered under paragraph (h) of section 207 its "clear import" is that it was to continue in full force and effect as long as the business of the new reorganization entity (whether a new corporation or the debtor corporation reorganized, as the case might be) remained in "operation".—In other words guess upon guess.

If the Court of Appeals' two guesses or its guess as to the purport of the injunctional order be taken as correct, as the injunction is so misconstrued your petitioner was enjoined by the District Court, on one theory of

the District Court's jurisdiction until final decree was entered in the bankruptcy proceedings proper, on another jurisdiction theory until expiration of the reorganization trust and on the Court of Appeals' favorite theory as long as the business of the new reorganization entity remained in operation,—presumably even unto the third and the fourth generation. And this on the sole ground that while the Thomas proceedings were pending your petitioner sent out to his fellow stockholders his letter of April 27, 1938 and without a scintilla of proof that in that letter there was a single false statement of fact or one undeserved charge against or reflection upon respondents herein.

How could that letter trespass upon the District Court's powers under paragraph (h) of Section 207 "to put the plan into effect" (Opinion, R. 70, 6th from last line) or be taken as "inconsistent with" or likely to interfere with the * * * execution of the plan as confirmed" (Opinion, R. 70, 3rd and 4th lines from the bot.)? That plan had years prior been "executed" (*supra* pp. 21-22). Consummation of the plan was execution of the plan. As respondents say (Trans. 6696, p. 38, par. 11; *supra* pp. 21-22), under oath (Trans. 6696, p. 44), the plan was consummated only some months after March 7, 1935, that is (Trans. 6696, p. 6, 9th line) June 29, 1935. And if that is not enough, on oral arguments herein in the Court of Appeals occurred this colloquy:

> "Justice Minton: Now there was a plan adopted and promulgated and this Mr. Thomas was enjoined from interfering with that accomplishment?
>
> Mr. Ferguson: No, your Honor, Mr. Thomas was not on the scene then, he did not come along until about three years later.
>
> Justice Minton: Had the plan gone into effect?
>
> Mr. Ferguson: The plan had gone into effect, yes, your honor."

VII.

Section 207, paragraph (h), 11 U.S.C.A. gives no jurisdiction whatever to the District Court over the business or affairs of the new reorganization entity, whether a new corporation or the debtor corporation reorganized after confirmation and consummation of the plan of reorganization.

Ruling of the Court of Appeals to the contrary hits the bulls-eye. Not however of respondents' target but of the target, the aim of your petitioner and his counsel. to force into the open the real issue. If under the Act the court of bankruptcy has jurisdiction of the business and affairs of the reorganization entity, whether that entity be corporation or individual, it is because the intent of the Act is not to return the involved property and business to the economic system of the country, but while it rolls away the stone intends that Lazarus shall never be loosed and let go.

There is no word "operation" (Opinion, R. 70, 2nd and 3rd lines from bot.) in paragraph (h) of Section 207. And the would-be injection of the word "operation" into paragraph (h), without attempt of justification for the same, is confession that the support the Court of Appeals theory of the force and effect of paragraph (h) is to hold that the operation of the business of the reorganization entity is forever to be under the jurisdiction and control of the bankruptcy court. This, we insist, is a *reductio ad absurdum.*

The reorganization entity is not necessarily, indeed under the present racket seldom is the debtor, and usually and as in the instant case if the reorganization entity is a corporation its stockholders are not the

former stockholders of the debtor corporation but the debtor corporation's former creditors. Let us not be confused by formalities of corporate structure. At least in equity the stockholders are the corporation and change of stockholders makes a change of the corporation. In the very instant case the plan of reorganization actually provided for incorporation of a new corporation and issuance of stock of that new corporation to the creditors of the debtor corporation (The Plan, Appendix, *post*). In this respect the letter of the plan of reorganization was not followed. Our guess is that instead the amount of authorized common stock of the debtor corporation was changed to fit the situation and then taken and used as the stock to be issued under the plan of reorganization to the debtor corporation's creditors.

The jurisdiction of the bankruptcy court after confirmation and consummation of the plan of reorganization which obtains, tho limited, until final decree dismissing the debtor is jurisdiction of the corporate debtor and its stockholders, of what is left of the debtor's affairs, not jurisdiction of the reorganization entity and its stockholders, the former creditors of the debtor.—When the plan of reorganization has been confirmed and consummated the jurisdiction of the bankruptcy court is of only the leavings. When the cake had been baked and glazed, it remains to the court only to wash the mixing bowls and pans. The bankruptcy court is not supposed or authorized by the Act to itself eat the cake.

Not all the lower courts are entirely blind to this situation. In memorandum opinion filed May 12, 1942, in the matter of 168 Adams Building Corporation, United States District Court for the Northern District of Illinois, Eastern Division, which had been pending some eight years and for four years after the plan of reorganization had been confirmed. His Honor William J. Campbell says in part:

> "This is an intolerable situation and I do not believe that Congress, in enacting 77-B ever meant to authorize it. Here is a corporation that for years has enjoyed and is now enjoying the benefits and protection of the local government authority without paying anything, either on its huge tax delinquency or even on the current taxes. Neither the letter nor the spirit of the Act justify the court in continuing the matter indefinitely. In these matters there must come a time when the sanctuary of the United States Court must be withdrawn **and the enterprise left to stand on its own economic feet. That time has now come.**"

This "operation" theory is born of necessity, of necessity to amend paragraph (h) of section 207 by ill-conceived judicial *dictum*. It was sired, however, by respondents. They present (Their Petition, Trans. 7497, p. 26, par. 18) as reason for non-entry of final decree that "unless the liability for taxes and penalties can be eliminated, the property has no future and it is unlikely that there will be any realization for the certificate holders [the former creditors of the debtor and now the stockholders of the reorganization new entity] on their original investment." How long is the bankruptcy court to continue its efforts to pay dividends to the stockholders of this reorganization new entity? What has become of our sacred American rugged individualism?

VIII.

By arbitrarily delaying entry after consummation of the plan of reorganization of the final decree dismissing the debtor and terminating the case, the District Court gathers moss not more jurisdiction; and the Bankruptcy Act and Science of Jurisprudence gather only barnacles.

By the order of May 7, 1935, confirming the plan of reorganization, the plan was expressly "approved and

confirmed, and decreed to be in full force, virtue and effect" (Rec. 3); and, this, in terms and in law, was a final decree. *Downtown Investment Association* v. *Boston Metropolitan Buildings, Inc.,* 81 Fed. 2nd, (CCA 1, 1936) 314 317, 322.

In re: Deep Rock Oil Corp., 113 Fed. 2nd, 266, 269, and *Meyer* v. *Kenmore Granville Hotel Co., et al.,* 297 U. S. 160, 80 L. ed. 557, are to be distinguished as involving an order of approval not an order of confirmation.

In general and inherent in the statute, when the debtor corporation has been "reorganized in compliance with the Bankruptcy Act" the purpose of the Act is effected, the goal of the Act attained and the jurisdiction of the Bankruptcy Court ends. *Cont. Ill. Nat. Bk. & T. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 72 Fed. 2nd, (CCA 7) 443, 451. *In re Schroeder Hotel Co.,* 86 Fed. 2nd, (CCA 7) 491, 493. *Old Fort Improvement Co.* v. *Lea,* 49 Fed. 2nd, (CCA 4, 1937) 286, 291.

The District Court as merely a court of equity no more has jurisdiction to supervise a reorganized corporation than to review or revise proceedings in bankruptcy. The Bankruptcy Act contemplates and authorizes transfer of the debtor's property to the reorganization entity for operation by that new entity,—not by the debtor or under continued control or supervision by the court. 8 C. J. S. (1st Ed., 1938), title Bankruptcy, Sec. 592, p. 1600. *Consolidated Gas, Elec. L. & P. Co.* v. *United Rys. & Elec. Co.,* 85 Fed. 2nd, (CCA 4, 1936) 799, 805, 2nd col.

A petition under Section 77 "contemplates a reorganization. That is the gist of the litigation, the heart of the petition, if it may be so called. To equitably adjust debts

of the debtor, * * *, make provision for its successful operation [by the reorganized debtor]—these are the objects sought". *In re Chicago & N. W. Ry. Co.*, 121 Fed. 2nd, (CCA 7) 791, 797.

The jurisdiction of the District Court which respondents would invoke is not the jurisdiction in bankruptcy acquired by the District Court by the institution of case No. 56875, but "the jurisdiction of this court over the 4145 Broadway Hotel Company stock voting trust, * * *: which jurisdiction", respondents say, "was acquired by this court in the course of the reorganization proceedings * * *, * * * reserved * * * by the decree of March 7, 1935" (Respondents' Petition, p. 6, Rec. 16, par. 17; par. 19.) That is to say that by the order finally confirming the reorganization plan, the District Court acquired a further jurisdiction by reserving jurisdiction which the District Court never had.

The consummation of the plan of reorganization adds nothing to the District Court's jurisdiction in bankruptcy, even tho its reluctant hand retards and postpones entry of the prescribed final decree dismissing the debtor and closing the case. At long last the court takes a pick at it (R. 35) but only to drop the matter (R. 36) and let it lie for years. Maybe the District Court's dereliction in not discharging the duty which the Act places on that court itself cannot be assigned as error. Maybe the only effective remedy would be mandamus at the instance of the debtor. But can it reasonably be claimed by anyone or soundly held by any court that in the years the District Court continued to neglect and omit to perform its statutory duty its jurisdiction grew in its hand?

The Circuit Court of Appeals calls it "assuming" (Opinion, R. 70, line 16), but in fact concedes that our

contention under this our Point VIII is correct; but says that "its application is dependent upon the provisions of the plan as confirmed and reservations, not inconsistent therewith, contained in the order of confirmation."

IX.

After the entry of the final decree of confirmation of the plan of reorganization and consummation of the plan, the Bankruptcy Court is without jurisdiction over the reorganized debtor or its affairs except so far as jurisdiction is reserved in the plan itself consistently (if such is possible) with that plan and is authorized by the Bankruptcy Act. The attempted reservations of jurisdiction in the order of confirmation (supra page 24) are without basis in the plan of reorganization (supra page 25, and the Plan, our Appen'x., post), or, for that matter, in the reorganization trust agreement, and are not only inconsistent therewith but virtual nullification thereof and inconsistent with and unauthorized by the Bankruptcy Act. They would substitute for the reorganization trust agreement a mere court receivership not merely for the life of the reorganization trust but for the life of the business of the reorganization new entity.

So held by the Circuit Court of Appeals Fourth Circuit in *Consolidated Gas Elec. L. & P. Co.* v. *United Rys. & Elec. Co.*, 85 Fed. 2nd, 799, 801, 802-803, 806; cert. den. 57 Sup. Ct. 493.

And (tho perhaps beside the mark since in the instant trust agreement there was no relevant "reservation" of or attempt to confer non-statutory jurisdiction on the bankruptcy court, *supra* page 24) we dissent from *In re Corona Radio & Television Corp.*, 102 Fed. 2nd, 959, 963,

in that the Circuit Court of Appeals for the Third Circuit in terms distinguished the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Argyle-Lake Shore Corp.*, 98 Fed. 2nd, 372, on the ground that the trust agreement in that case provided for termination of the trust by vote of two trustees "subject to the approval of the District Court". As above presented, we insist that the Bankruptcy Act gives no jurisdiction to the District Court, once the plan of reorganization is consummated, to supervise or control the affairs of the reorganization entity or the reorganization trustees for the former creditors of the debtor and now *cestui que trustents* of the reorganized business, or, in case the reorganization new entity is a corporation, the stockholders thereof.

X.

As follows, the District Court was without jurisdiction to entertain respondents' petition of June 17, 1940 (Trans. 7497, pp. 17-27) to enter thereon the decretal order of August 6, 1940 (Trans. 7497, pp. 159-162), to hold therein that the injunction of May 26, 1938, continued in force after June 22, 1938, and was still in full force and effect, to hold therein that the reorganization trust had not been terminated in 1939, to hold therein that the proposed $110,000.00 mortgage was not effectively dissented to in 1940, and to hold therein that the trustees had not been removed in 1940; and erred in so doing.

The decretal order of August 6, 1940, "was not * * * necessary to effectuate any decree entered by the District Court in the reorganization proceeding" or any provision of any decree or order which the District Court had jurisdiction to enter or provide. *In the Matter of 4145 Broadway Hotel Co.*, 124 Fed. 2nd, 821.

The acts of the District Court in assuming by the decretal order of August 6, 1940, entered under respondents' petition of June 17, 1940, to pass upon the results of the referendum of May 1, 1939, of the balloting for approval or dissent to the placing of the proposed mortgage and on the force and effect of your petitioner's action of June 15, 1940, to remove respondents as trustees, were purely voluntary and extra-judicial acts. *People* v. *Crowley,* (Ill. App. Ct., First Dist.), 38 N. E. 2nd 556, abstract only.

XI.

Not only by order and affirmance of order committing your petitioner to jail, but over and over again in the course of "the sordid history of this reorganization matter" your petitioner has been denied his guaranteed civil rights, freedom of speech, right of contract, property rights and personal liberty.

We presume to quote his Honor Presiding Judge Evan A. Evans at the oral arguments of CCA cases numbers 7888 and 7891.

> "I am interested in Thomas having his say now as to whether or not the trustees are managing the property properly, and the question is,—is he barred from doing so by virtue of the order that was made along back in 1938 which prevented him, so far as your contention is concerned, prevented him permanently from writing any letters to stockholders. Regardless of what he may have done in the past is he barred from writing them making complaint of the action of the trustees? That is the principle that is involved that I complain of."

And further:

> "If this were a single isolated case I would not think of it so much as if it weren't. They name the trustees and name them for ten years. After the reorganization plans have been approved and adopted a certificate holder, who might be myself or might be you or anybody else, can't say anything about these trustees that are named for ten years."

XII.

Red Herrings, yes: The Circuit Court of Appeals' characterization of the history of this reorganization matter as sordid was wholly uncalled for and well calculated to prejudice your petitioner in more ways than one.

We discussed this with the Circuit Court of Appeals in our petition for rehearing (Our Petition, R. 86). The Court of Appeals itself said (Opinion, R. 69, lines 17-22) "that no good purpose could be served by detailed statement of the facts so elaborately argued by appellant for the reason that the only real question presented has to do with the jurisdiction of the court to enter and continue in force the injunction order of May 26, 1938 * * *." Why then refer to the factual history of this litigation and dub it "sordid"?

Even more uncalled for (Opinion, R. 69, lines 30-33) was the court's "Furthermore, appellant has cautiously and, we think, prudently refrained from presenting any argument in defense of or in extenuation of the punishment imposed by the District Court".—The writer of the opinion did not mean what he wrote, but what he meant to write may be inferred.

Petitioner is not here fighting for a few days one way or the other in or out of the county jail, nor for himself alone but for all of the present stockholders of 4145 Broadway Hotel Company and the general public. With so much at stake is your petitioner guiltily over-cautious and over-prudent in keeping up the fight to the last ditch, behind him only (a) the holding of the Circuit Court of Appeals for the Seventh Circuit in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, that the injunction of May 26, 1938, was a temporary injunction the purpose [ergo the effect] of which was only to preserve the *status quo* of the Thomas proceedings so long as an appeal by your petitioner from the order of May 23, 1938, was a

legal possibility, (b) the advice of his counsel and (c) his abiding faith that he would yet receive justice at the hands of the courts of his country?

Red Herrings! Even the gods sometimes nod. This type of argument is not reasoning but mere self-justification,—a lifting of preconcluded opinion by the bootstraps of prejudice.

XIII.

The proven public as well as private need of light in the premises from this Honorable Court.

It is but fair to say that the series of opinions of the Circuit Court of Appeals for the Seventh Circuit in the course of "the sordid history of this litigation" serve a purpose, as sometimes the wrath of man praises God:

No better proof could be asked or found than the opinion herein of the Circuit Court of Appeals, especially its last opinion, the cases there cited and the court's attempted use of those cases, of the sad need that this Honorable Court let a little sunshine in to dispel the fog in which the lower federal courts are muddling around in this type of case.

And it please your Honors, before you are petitioner and respondents. We say "respondent" for respondents are one, — the Bondholders Committee — Receivership Racket. Petitioner and Respondent are before your Honors,—crusader and crucifier. May the judgment of Solomon be your Honors',—and without having to cut the bondholders, stockholders herein, asunder or longer deny them freedom of speech.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.

APPENDIX.

11 U. S. C. A., Section 207, paragraphs (f) and (h).

Paragraph (f): " * * * Before or after a plan is confirmed, changes and modifications may be proposed therein by any party in interest and may be made with the approval of the judge after hearing upon notice to creditors and stockholders, subject to the right of any creditor or stockholder who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor or stockholder, and if any creditor or stockholder having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified; Provided, however, That the plan as changed or modified shall comply with the provisions of subdivision (b) of this section and shall have been or shall thereafter be accepted as required by the provisions of subdivision (e), clause (1), of this section, including acceptances by reason of failure to withdraw as hereinbefore provided, and the provisions of this subdivision (f), and of subdivision (e), clause (2), of this section, shall have been complied with in respect thereof. Upon confirmation of the plan by the judge, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto * * * ".

Paragraph (h): "Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case * * * ".

REORGANIZATION PLAN.

This Agreement made and entered into this 20th day of December, 1934, by and between

George W. Rossetter,
Jay C. McCord, and
Sidney H. Kahn,

not personally, but as the Flanders Apartment Hotel First Mortgage Bondholders' Committee constituted under a deposit agreement dated March 6, 1931, party of the first part, (hereinafter referred to as the "Committee"), and

4145 Broadway Hotel Company, an Illinois corporation, party of the second part, (hereinafter referred to as the "Corporation"),

Witnesseth:

On September 15, 1923, Flanders Hotel Building Corporation, an Illinois corporation, issued its 6½% first mortgage bonds in the amount of $1,350,000.00 and to secure the payment of said bonds and the interest coupons pertaining thereto, executed its trust deed and chattel mortgage to Melvin L. Straus, as Trustee, dated September 15, 1923, conveying the property known as the "Flanders Hotel" located at the Southeast Corner of Broadway and Buena Avenue, Chicago, Illinois, together with the personal property located therein. Unsubordinated first mortgage bonds in the amount of $1,191,000.00 remain outstanding and unpaid. Defaults occurred in the payment of principal and interest on these bonds and S. W. Straus & Co. purchased bonds and coupons as they matured and subordinated them to the outstanding bonds and interest coupons. S. W. Straus & Co. acquired title to the property subject to the outstanding bond issue.

On May 18, 1931, by reason of further defaults, the Trustee declared all of the outstanding bonds due and payable and instituted foreclosure proceedings. On January 20, 1932, a final decree of foreclosure and sale was entered, but no sale of the property has been had. The Committee was organized on March 6, 1931 in order to protect the interests of the unsubordinated first mortgage bondholders and the Committee now has on deposit $1,143,800.00 or approximately 96% of the total outstanding issue.

On December 28, 1932, the Committee entered into an agreement with S. W. Straus & Co. wherein S. W. Straus & Co. agreed to convey title to a nominee of the Committee and to transfer to the Committee all of the subordinated bonds and interest coupons held by S. W. Straus & Co. in consideration of the sum of $5,000.00 to be paid by the Committee to S. W. Straus & Co. Such amount was to be paid, however, only after all delinquent taxes had been paid, a reserve had been created for the payment of all accrued taxes and all expenses in connection with the foreclosure and reorganization had been paid in full. At the date of the making of said agreement, the investment of S. W. Straus & Co. in said property amounted to the sum of approximately $260,900.00. No part of said sum of $5,000.00 has as yet been paid, but S. W. Straus & Co. caused title to be conveyed to a nominee of the Committee, who thereupon conveyed title to the property to the Corporation.

Since the date of the foreclosure proceedings the property has been under the management of Frank J. Hannahan who was appointed receiver in the foreclosure proceedings.

On August 10, 1934, Marian R. Abercrombie, Andrew L. Corbey and Rose Mary King, attorney in fact for

Amanda Koenig, filed their petition in the District Court of the United States, for the Northern District of Illinois, Eastern Division, Number 56875, asking for a reorganization under the provisions of Section 77B of the Bankruptcy Act, as amended. Said petitioning creditors have indicated their desire to cooperate with the Corporation and the Committee in the adoption and promulgation of a plan of reorganization.

Now, Therefore, in consideration of the premises and of the mutual covenants and agreements of the parties hereto, the parties hereto do hereby agree to the following plan of reorganization:

1—11,910 shares of the common stock of the Corporation shall be issued to three Trustees to be selected by the Committee. Trust certificates shall be issued to the holders of unsubordinated first mortgage bonds and each first mortgage bondholder shall receive a trust certificate representing one share of stock for each $100.00 in face amount of bonds owned by him. The stock so issued to the Trustees shall be the only outstanding stock of the Corporation so that the trust certificates issued to the holders of the unsubordinated first mortgage bonds will represent 100% of the outstanding stock of the Corporation.

2—The Corporation will execute a trust agreement with the three Trustees. The trust agreement shall endure for a period of ten years, subject to termination in the manner herein described. Not later than sixty days prior to the expiration of the first two-year period of said trust, the Trustees shall call a meeting of all trust certificate holders, or in lieu of such meeting, shall conduct a referendum of all trust certificate holders for the purpose of determining their wishes as to the termination of the trust. In the event that 51% or more in amount of

the trust certificate holders vote in favor of the termination of the trust, either at such meeting or through such referendum, then and in such case, the trust shall be dissolved as of the date of the end of the first two-year period and the stock of the Corporation shall be issued pro rata to the then holders of the trust certificates. If the holders of 51% or more in amount of the trust certificates do not vote in favor of the termination of the trust, then the trust shall be continued. If at the expiration of the first two-year period the trust is continued, as hereinabove provided, then a similar meeting or referendum shall be held prior to the end of the second two-year period to determine whether the trust shall be then terminated in the same manner as hereinabove provided at the end of the first two-year period. Similar meetings or referenda shall be held at the end of each two-year period to determine whether the trust shall be terminated at the end of such period unless the trust shall theretofore have been terminated by the certificate holders or by a majority of the Trustees, and in any event, the trust shall terminate at the expiration of ten years from the date of the original trust agreement. The Committee shall nominate three persons satisfactory to the court to serve as the original Trustees. The committee shall also nominate the Depositary. Any vacancy among the Trustees shall be filled by the remaining Trustees. The Trustees shall have the right at any time to remove the original Depositary or any successor Depositary and to appoint a successor Depositary. The trust agreement shall provide that any of the Trustees may be removed and a successor Trustee appointed at any time upon the written direction of a majority in amount of the holders of the outstanding trust certificates. The Trustees shall be entitled to receive usual and reasonable compensation for their services, but the annual compensation of the

Trustees in the aggregate shall not exceed 1% of the gross income of the Corporation. The Depositary shall be entitled to receive reasonable compensation for its services, which compensation shall not exceed the regular fiduciary charge for such services. The compensation and expenses of the Trustees and their Depositary shall be paid by the Corporation. The trust agreement shall be in form satisfactory to counsel for the Committee and for the petitioning creditors in the bankruptcy proceeding.

3—The trust agreement shall provide that the Trustees shall not vote the shares of stock held by them in favor of a resolution authorizing the sale or mortgage of the property unless written notice of the terms and provisions of the proposed sale or mortgage has been given to all certificate holders at least fifteen days before the date of the meeting of stockholders at which it is proposed to vote upon such proposed sale or mortgage, and the Trustees shall not vote in favor of any such proposed sale or mortgage if one-third or more in amount of the holders of the trust certificates dissent in writing from such proposed sale within fifteen days after the giving of such notice. The Trustees shall also have the power to sell the shares of stock held by them; but the trust agreement shall provide that the Trustees shall not sell the shares of stock held by them unless written notice of the terms and provisions of the proposed sale has been given to all certificate holders at least fifteen days before the date of the proposed sale, and the Trustees shall not sell such stock if one-third or more in amount of the holders of the trust certificates dissent in writing from such proposed sale within fifteen days after the giving of such notice. The Trustees shall have the right to apply to any court of competent jurisdiction for its approval before completing any sale or mortgage of the

property or before completing any sale of the stock held by them, but shall not be required so to do.

4—The Corporation shall by written agreement indemnify the Committee against any and all taxes, assessments or other governmental charges which may be levied or assessed against it and against any and all other liability which may be suffered or incurred by the Committee by virtue of the reorganization plan including expenses and attorneys' fees in the event that litigation is instituted against the Committee or any member thereof. The Corporation shall assume and agree to pay the reorganization expenses hereinafter referred to and these expenses shall be paid in full before any dividends shall be declared or paid upon the stock of the Corporation.

5—Subject to the approval of the court, the following reorganization expenses shall be allowed:

(a) To cover the general expenses of the Committee including the charge of Securities Service Corporation, 1% of the face amount of deposited bonds plus out of pocket expenses;

(b) Compensation of the Committee on the basis of ½ of 1% of the face amount of deposited bonds;

(c) Charge of the Depositary on the basis of ¾ of 1% of the face amount of deposited bonds, plus out-of-pocket expenses;

(d) Compensation of counsel for the Committee;

(e) Compensation of counsel for the petitioning creditors.

In addition, there shall be allowed the expenses and charges in the foreclosure proceeding, including the Trustee's fee, the fee of Trustee's counsel, court costs and Master's fees. There shall also be allowed and paid the actual expenses to be incurred in connection with the

organization of a new corporation, printing of the trust agreement and the new securities, stamp taxes, title guaranty expense, court costs in the bankruptcy proceeding and other similar items. The corporation shall also assume said contract with S. W. Straus & Co., which is now held by S. W. Assets Liquidation Corporation, but the moneys due under said contract shall not be payable until all of the foreclosure and reorganization expenses have been paid in full and provision has been made for all unpaid and accrued taxes.

6—The Committee will submit the plan of reorganization to all depositing first mortgage bondholders and also to all nondepositing first mortgage bondholders whose names and addresses are known to it, and the Committee will file claims on behalf of depositing first mortgage bondholders and will also file the necessary consents to the plan of reorganization on behalf of depositing first mortgage bondholders. The Committee will also cause the Corporation to file its consent in the bankruptcy proceedings to the foregoing plan of reorganization.

Unless all of the holders of the unsubordinated first mortgage bonds consent to and approve of the plan of reorganization, it is distinctly understood and agreed that the approval of the plan of reorganization by the first mortgage bondholders consenting thereto and/or the acceptance by said first mortgage bondholders of the new securities hereinabove provided for, are expressly conditional upon the entry of a valid order or decree confirming and approving the plan of reorganization, binding upon direct or collateral attack upon all of the persons who have any right, title, interest, lien or claim in or to the above mentioned property, whether or not such persons consented or adhered to said plan of reorganization

or whether or not they accepted any benefit thereunder. If for any reason the order or decree hereinabove referred to shall be reversed, set aside or held void or invalid, all of the first mortgage bondholders consenting to the plan of reorganization or taking any benefit thereunder shall be restored to their former right, title, lien or claim in and to said premises as if this plan of reorganization had never been in existence.

7—It is understood that in executing this agreement the Committee does so solely as a Committee and not as individuals and only pursuant to and in connection with the powers granted to the Committee by the terms of said deposit agreement subject to all the rights of depositing bondholders set forth in said deposit agreement. It is further understood that no individual member of said Committee shall be deemed personally bound by any covenant, undertaking or agreement herein, and no personal liability or personal responsibility is assumed by nor shall at any time be asserted or enforced against the members of the Committee either individually or collectively by reason of any of the provisions hereof or by reason of any action or nonaction taken or permitted to be taken pursuant to the provisions hereof.

George W. Rossetter
Jay C. McCord
Sidney H. Kahn
Not personally but as the Flanders Apartment Hotel First Mortgage Bondholders' Committee.
4145 Broadway Hotel Company,
By Edward R. Heinsiemer,
President.

Attest:
M. C. Kuehn,
Secretary.

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62 120 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—56875) * *

Before:
Holly, J.
Monday, May 23, 1938. 10:00 o'clock A. M.
Court met pursuant to adjournment.
Present:
Mr. Nath,
Mr. Kinsey.

EXCERPT FROM PROCEEDINGS.

Mr. Kinsey: I say, far from being held in contempt, or far from having this restraining order continued, their own trust document says one of
121 the ways to remove the Trustees is to get sufficient—well, here it is:

"Any or all of the Trustees may be removed by the registered holders of participating certificates representing not less than a majority of the outstanding capital stock then held by the Trustees by an instrument in writing executed in triplicate by the requisite number of certificate holders, one copy of each such instrument to be delivered to the corporation, one to the Trustees, and one to the depositary of the Trustees."

They even provide that way of removing them. Then they go on further:

"Any action which the certificate holders are permitted to take hereunder may be taken by the certificate holders in person, or by attorney in fact."

Now, we were out for attorneys in fact, and, far
63 from what we are accused of, that we are not getting these for the purpose of litigation, we are not. We are trying to get a picture of this as to the other people who are being milked here. That is what we are trying to do.

122 Some of those letters I have seen, and they are very enlightening, your Honor, they are very enlightening, and they show that these people are

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heartily dissatisfied with the way the building is being handled.

That is our side of the story. Let us not have words put into our mouth by counsel, and have him telling us that our sole purposes here are that we are lame and we need more support for our litigation and therefore we are out trying, we are out finding people and trying to get their rights to act in their stead in this litigation. That is not the case at all. That is not the case at all. It is one of the methods that this Trust Agreement which they prepared, and with which they should be chargeable to the last letter, has for removing the Trustees.

The Court: They can not be removed at this time, can they?

Mr. Kinsey: Why can't they? The document provides these ways.

The Court: These Trustees are appointed for a specific length of time.

Mr. Nath: The Trust lasts for ten years, and there is a referendum every two years, but if the majority of holders of trust certificates wanted to remove
123 these trustees they could be removed at any time.

Mr. Kinsey: Yes; that is it. You bet.

Mr. Nath: The question your Honor should consider is whether or not the efforts to remove these Trustees should be based on this kind of a letter. I would be very much surprised if certificate holders were not dissatisfied after receiving that kind of communication.

The Court: So would I. Now to send this out at a time when this matter was pending I think is distinctly contempt of this court. You are making your charges here as though you had proved these things.

Mr. Kinsey: Your Honor we haven't even a petition in court yet. He is talking about us being in court here but we presented a petition and it was denied.

The Court: You are in court when you ask leave to file a petition, and you were in court when this letter of April 27th was sent out.

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64 Mr. Thomas: This was no reflection on the Court. It is two separate methods.

The Court: It is a reflection, it is an interference with the matter pending here.

Mr. Thomas: No, separate transactions, according to the trust agreement. It has nothing to do with
124 the other case pending at all.

The Court: Well, I do not want to enforce any penalty for contempt of court, and I probably would not if this sort of thing is not going to continue. But, if it is going to continue, then I will have to take appropriate action for what has been done, as well as ordering the stopping of it in the future.

If you are willing that the injunction should be entered and the letters shall not be sent out unless they are submitted,—no letters shall be sent out unless first submitted—I would not be inclined to punish for what has been done. But, unless you are, then I will have to.

Mr. Thomas: Well, those cestui que trusts who have already sent in their powers of attorney to me before any restraining order was issued, are being deprived of their rights.

The Court: I know, but we have litigation pending here, and there will be no further sending out of these, nor the use of the powers of attorney until we have heard from the Circuit Court of Appeals, until we have heard the Circuit Court of Appeals say whether I am right or wrong in denying leave to file the petition.

125 Mr. Thomas It just delays our rights under this other agreement; it has nothing to do with that.

The Court: I know.

Mr. Thomas: He hasn't even got one of those in court; he says they have, but it is not in court.

The Court: You have these two things pending.

Mr. Thomas: You are finding me in bad faith in listening to counsel representing both debtor and creditor in a bankruptcy case.

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The Court: Until the Circuit Court of Appeals says I am right or wrong in this,—if I am right in this, then it would be an entirely wrong thing to permit these communications of this sort to be sent out.

Mr. Thomas: Can't we appeal this restraining order?

Mr. Kinsey: Certainly.

65 The Court: If I am right about this the Circuit Court of Appeals will decide it very shortly. You don't need to take action until the Circuit Court of Appeals has passed on this.

Mr. Thomas: That stops us.

The Court: As I say now, I don't know, but if it is necessary I will have to impose a penalty for what has been done.

Mr. Kinsey: Oh, no, we are amenable to the
126 Court's wishes in the matter, and I speak for the client on that.

The Court: The order may be entered enjoining the sending out of any further communications until they are submitted to the Court. Then I would be inclined to overlook what has been done.

Mr. Kinsey: I also might suggest to the Court that we have a right to appeal this restraining order that you are imposing on us now.

The Court: If we are going to have that fought out, if this is contempt, perhaps we better have the whole thing fought out. If it is contemptuous then the penalty should be imposed. If it is not contemptuous, then the Circuit Court of Appeals will say it is not, and the penalty will be removed. But, if I am right in this thing there has been a contempt, a contempt of this Court has been committed. I was willing to waive it if you are willing while this appeal is pending, to forego sending out any other communications.

Mr. Thomas: May my counsel file a brief with you setting up some of these facts; may my counsel file a brief with you showing where it has not been in contempt?

127 The Court: I have the communication here. I do not need a brief on that question.

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Mr. Kinsey: The Court has that.

The Court: I have the communication here.

Mr. Kinsey: Certainly.

The Court: And I don't need a brief on that question.

Mr. Kinsey: I understand that.

The Court: It is just a question of whether you are willing to refrain until the Circuit Court of Appeals determines whether I am right. I may be wrong.

Mr. Kinsey: Yes, your Honor.

The Court: If the Circuit Court of Appeals says I am wrong it is different, a different story, entirely. Until that time I do not want any more communications sent out.

Mr. Kinsey: Yes; and I think we will regard that as being an order on us not to.

66 The Court: I want to know whether there is a consent to this order—

Mr. Kinsey: I do.

The Court: —restraining the sending out of any more communications until this—

Mr. Thomas: No objection to us coming back to you, if we change our minds, with a motion, is there?

The Court: That does not preclude you from
128 submitting any further communications you want to send out, it just precludes you from sending out any that have not been approved.

Mr. Thomas: A stockholder can talk to another stockholder, and have no intention of it being part of the other case, or anything to do with it,—of course, if we are forbidden to talk to other stockholders what chance have we?

The Court: What harm is going to come to you—

Mr. Thomas: Plenty; there is an emergency.

The Court: Wait until I finish.

Mr. Kinsey: Let the Court finish.

The Court: What harm is going to come to you until the Circuit Court of Appeals has passed on it?

Mr. Thomas: It is a question of my good faith.

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Counsel deliberately made misstatement after misstatement.

The Court: I say, what harm is going to come to you from—

Mr. Thomas: A lot of harm. I have had plenty of expense.

The Court: If you don't want to agree, if it can not be a consent order, we will proceed on the contempt matter.

Mr. Kinsey: Your Honor, let us look at it like this: Mr. Thomas, I think, is a little bit heated
129 up over this, because he thinks counsel here is using pretty slippery words on him, especially when counsel, the firm he represents, was attorney for the debtor, and he is attorney for the bondholders, and he is attorney for the trustee.

Mr. Nath: That is absolutely a misstatement that I was ever Attorney for—

Mr. Thomas: Well, your firm was.

Mr. Nath: My firm?

Mr. Thomas: Do you want me to prove it?

The Court: Just a moment. If you want to talk with your client I will defer action on this until, say, tomorrow morning, and as I say, if he is willing to a consent order being entered restraining him from sending any further communications until the appeal is disposed of in this matter—

67 Mr. Kinsey: If that is disposed of to our disadvantage, would there be anything stopping us then from soliciting bondholders, where one of them may move along that line, to have a vote on these Trustees?

The Court: I will determine that. All I am asking now is that he refrain from sending our communications while this is pending.

130 Mr. Kinsey: Yes.

Mr. Thomas: Unless I communicate with you.

Mr. Kinsey: I think you better.

The Court: Yes. Draw a consent order to that effect.

Trans. Page

Mr. Kinsey: Yes.

Mr. Nath: I will draft it and send it to counsel.

The Court: All right.

Mr. Nath: And send it over to your clerk.

Mr. Kinsey: Yes, I would like to have a copy of it.

Mr. Nath: Now, listen here, just a moment.

Mr. Thomas: Just a moment; I will show you.

Mr. Nath: That is in connection with the 77B proceeding where we represented the bondholders who already owned the stock.

Here is a sample of what we have to face: Counsel stated I represented the debtor, and therefore it was for that reason, and I am therefore representing all kinds of parties. He comes in with a photostatic copy of something showing we filed in this proceeding something on behalf of the—

Mr. Thomas: The answer of the debtor.

Mr. Nath: The debtor corporation. The an-
131 swer itself is filed by the 4145 Broadway Hotel Company, a corporation, and the only thing that there is, apparently, that makes him feel that this is our answer is the fact that it is our court back on the back of this, and counsel must know that at the time when this was filed the Bondholders Committee owned all the stock of the debtor corporation, and, therefore, in helping the debtor in any way whatsoever we were helping carry out this plan of reorganization.

Mr. Thomas: The stock was not in the name of any member of any Bondholders Committee at that time.

Mr. Nath: That is a sample of what we are faced with.

Mr. Thomas: Four months later they take a document on there and mark it there that somebody else received it,—in the court files.

The Court: Prepare a consent decree and I will forego the contempt. I don't want to impose any penalty unless I am compelled to.

(Adjourned.)

Motion of Petitioner touching transcripts of record.

Comes now your petitioner F. Gerald Thomas and moves this Honorable Court to excuse your petitioner from filing more copies of the transcript of record in CCA case numbers 6696 and 6733, consolidated, than the one certified copy herewith presented to the Clerk for filing.

And as grounds of this motion petitioner states, and the fact is, that no other copy of that transcript of record is to be had without reprinting the same; and in further explanation adopts as part hereof and refers the Court to the FOREWORD of petitioner's petition for certiorari, *supra* pages 1-3.

F. GERALD THOMAS,
Petitioner.

LLOYD C. WHITMAN,
Counsel for Petitioner.

State of Illinois,
County of Cook—ss.

F. Gerald Thomas, on oath says that the statements of fact in and in support of the foregoing motion and in petitioner's FOREWORD in his petition for certiorari under this same cover, pages 1-3 thereof, are true.

F. GERALD THOMAS,
Affiant.

Subscribed and sworn to before
me this 8th day of January, 1943.
CATHERINE DEE,
Notary Public.

FEB 6 1943

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

DEBTOR.

(C. C. A. case No. 7888)

F. GERALD THOMAS,

petitioner,

vs.

THE UNITED STATES OF AMERICA,

respondent.

(C. C. A. case No. 7891)

F. GERALD THOMAS,

petitioner,

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

BERNARD NATH,
ISAAC E. FERGUSON,
of Chicago, Illinois,
attorneys for George W. Rossetter, Jay C. McCord and Maurice A. Rosenthal, as trustees,
respondents.

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Summary of Argument.

The injunction order entered by the district court May 26, 1938—for the violation of which the petitioner has been adjudged in contempt of court—was affirmed by the circuit court of appeals October 25, 1938, rehearing denied December 14, 1938 (100 F. 2d 7), therefore the injunction order itself is no longer open to review.

February 14, 1939 the petitioner filed in the district court a petition to vacate or terminate the injunction, on the ground that the injunction had fully served its purpose and had therefore become a nullity. This petition was denied March 20, 1939, whereupon petitioner applied to the circuit court of appeals for leave to appeal from said order. On April 27, 1939 the circuit court of appeals filed a memorandum opinion denying leave to appeal. This memorandum opinion has recently been published (130 F. 2d 487).

The question whether the injunction was still in full force and effect again arose in 1940, in connection with a petition filed in the district court by the respondents, as stock trustees of 4145 Broadway Hotel Company, praying for the instructions of the court with

respect to a proposed mortgage loan by which to clear up tax arrearages and to rehabilitate the property of the corporation. The district court entered a decree August 6, 1940 holding void certain powers of attorney obtained by Thomas from certificate holders in violation of the injunction. This decree was affirmed by the circuit court of appeals (117 F. 2d 639) and thereupon a petition for certiorari was filed in this court to review the judgment of the circuit court of appeals. The petitioner contended that the injunction order of May 26, 1938 had expired automatically at the midnight hour of June 22, 1938, therefore the court had improperly refused to recognize validity of powers of attorneys obtained in defiance of the injunction. The petition for certiorari was denied June 2, 1941 (case No. 1041, October term 1940).

On the present appeal to the circuit court of appeals, the petitioner raised no question regarding his guilt or punishment. His designation of record on appeal did not include the evidence heard by the district judge. He limited his appeal solely to the question of the jurisdiction of the district court. He contends here, first, that the injunction order should never have been entered, which contention comes four years too late; second, that the injunction expired June 22, 1938, a contention now three times rejected by the circuit court of appeals.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

We refer the court to the petition and answer in case No. 1041, October term 1940, wherein a petition for writ of

certiorari was filed by F. Gerald Thomas (and Ralph C. Golding) and denied by this court on June 2, 1941. The petitioners in said case No. 1041 sought review of the judgment rendered in the same case by the circuit court of appeals on February 11, 1941 (117 F. 2d 639; certiorari denied 313 U. S. 593).

One of the points adjudicated by the circuit court of appeals, in its decision of February 11, 1941, was that the injunction order entered by the district court May 26, 1938 was still in full force and effect. It appeared that the petitioner had flagrantly and persistently disregarded the injunction order ever since it was entered, but although in the former proceeding no personal punishment was meted out to the petitioner for his disobedience of the injunction he was denied the fruits of his disobedience, namely, use of the powers of attorney obtained in defiance of the injunction from various holders of voting trust certificates of 4145 Broadway Hotel Company.

Despite the ruling by the circuit court of appeals on February 11, 1941 that the injunction was still in force, Thomas brazenly continued to flaunt the injunction; in particular, by sending to the certificate holders further vicious diatribes against the voting trustees (and incidentally against the district judge and the judges of the circuit court of appeals). (District court findings of fact Nos. 16, 17, 18, 19, 20 and 21, R. 22-24.)

On a petition filed by the respondents April 18, 1941 charging Thomas with contempt of court (because of his further violations of the injunction order after February 11, 1941, when the circuit court of appeals rendered its former decision), the district court adjudicated that Thomas was guilty and should be punished by commitment to jail for 90 days. On the appeal from this order to the circuit court of appeals, petitioner chose not to include in the record on appeal the evidence heard by the district court on the petition to punish him for contempt. He lim-

ited his argument on the appeal solely to the question of jurisdiction; submitted nothing to the reviewing court in challenge of the justice of the order appealed from, or the fairness of the punishment imposed upon him for his contemptuous conduct.

The question of jurisdiction, so elaborately presented in the petition for certiorari, when shorn of irrelevancies (and mud-slinging innuendoes), comes down to two alternative propositions: either (1) that all jurisdiction of the district court in bankruptcy case No. 56875 ended March 7, 1935, when the plan of reorganization of the debtor corporation was confirmed, therefore the court had no jurisdiction to enter the injunction order of May 26, 1938; or (2) that even though the court had jurisdiction to enter the injunction order, the injunction somehow lost its last vestige of vitality at the midnight hour of June 22, 1938, therefore could be disregarded by petitioner at any time thereafter.

Former adjudications.

The injunction order was entered in district court case No. 56875 on May 26, 1938. Although the petitioner now contends that the injunction lost all efficacy June 22, 1938, he made a motion to modify the injunction order on June 23, 1938, which motion was denied. (R. 18, ¶ 5.) Thereafter he prosecuted an appeal from the injunction order to the circuit court of appeals and on October 25, 1938, the appellate court affirmed the injunction order. (100 F. 2d 7; rehearing denied December 14, 1938.)

On February 14, 1939 Thomas filed a petition in the district court to vacate or terminate the injunction order. On hearing of said petition and the answer filed by the respondents, the petition was denied. (R. 37—March 20, 1939.) Thomas then filed a petition in the circuit court of appeals for leave to appeal from said order of the district court and on April 27, 1939 the appellate court filed a memorandum opinion denying leave to appeal. (130 F. 2d 487.)

At no time since April 27, 1939 has the petitioner seen fit to request the district court to dissolve or modify the injunction order of May 26, 1938.

The question of the validity and continued effectiveness of the injunction order arose again in the district court in the proceedings already brought to the attention of this court in petitioner's former application for a writ of certiorari. (Case No. 1041, October term 1940.) The district court decreed on August 6, 1940 that the injunction order was still in full force and effect; the circuit court of appeals affirmed said decree of August 6, 1940 by its decision of February 11, 1941 (117 F. 2d 639). The petition for a writ of certiorari to review said former judgment of the circuit court of appeals was based on precisely the same jurisdictional grounds now urged by the petitioner, but this court declined to review the judgment. (See district court findings of fact Nos. 8-14, R. 18-21.)

No reason for allowance of certiorari.

The circuit court of appeals said: "Appellant has cautiously and, we think, prudently refrained from presenting any argument in defense of or in extenuation of the punishment imposed by the district court." (R. 69.)* Since appellant raises no question regarding his guilt, but only the question whether the district court had jurisdiction to punish him for his violations of the injunction order, it is apparent that the present application for certiorari presents no question not already presented in petitioner's former application for certiorari (case No. 1041).

This case involves no question of general interest regarding the nature and extent of the jurisdiction of a court of bankruptcy in a reorganization proceeding after the plan of reorganization has been approved. The supplementary proceedings in district court case No. 56875 in the

* The record on appeal did not include the evidence. (Appellant's designation of contents of record—R. 50.)

forepart of 1938, which resulted among other things in the entry of the injunction order of May 26, 1938, were initiated by Thomas himself by a series of petitions seeking a general review of all the prior proceedings in the case. (Findings of fact Nos. 2-4, R. 16-17; also docket entries—R. 34-35.)

The plan of reorganization approved by the district court March 7, 1935 made no provision for disposition of unpaid real estate taxes on the property of the debtor corporation for the years 1927-1934 aggregating over $100,000 in principal amount and accruing interest at the statutory rate of 1% per month. At that time it was impossible to raise any money to pay the defaulted taxes. Under the conditions then prevailing, the best that the court and the parties could do was to turn over the property to the reorganized corporation and let the stock trustees try in the future to solve the problem of the unpaid taxes. Fortunately, the corporation was able to meet current taxes during the years 1935-1939 and meanwhile the officers of Cook County, Illinois took no action to foreclose the property for nonpayment of the 1927-1934 tax arrearages. Not until 1940 did it become possible for the reorganized corporation to obtain a mortgage loan, conditioned upon payment of the old taxes and general rehabilitation of the property. As contemplated by the reorganization plan and voting trust agreement (petition, pp. 24 and 26), the stock trustees sought the instructions of the court with respect to the proposed mortgage. The court approved the plan of the trustees to borrow $110,000 on a first mortgage loan, approximately $85,000 to be used to compromise and dispose of the 1927-1934 tax arrearages (at savings of over $125,000) and approximately $25,000 to be used to rehabilitate the property.

Except for this single instance in 1940, when the stock trustees presented to the district court the mortgage and tax settlement program approved by the decree of August

6, 1940 (affirmed 117 F. 2d 639), the jurisdiction exercised in bankruptcy case No. 56875 since 1935 all traces back to the initiative of F. Gerald Thomas.

The petitioner urges that a final decree closing bankruptcy case No. 56875 is long overdue. The circuit court of appeals said: "We need not inquire as to the reason for this long delay in the filing of a final decree. If such inquiry were pertinent, however, the persistent activities of appellant, no doubt, afford a partial reason." (R. 70.) The views of the circuit court of appeals for the seventh circuit regarding the proper scope of jurisdiction in a reorganization proceeding, after approval of a plan of reorganization, have been fully and clearly stated in a series of recent decisions and no obscurity in the law arises from the decision of the circuit court of appeals in the present case. (See cases cited—R. 70.)

Conclusion.

The petition for certiorari is replete with misleading statements, many of them outside the record, also aspersions upon the integrity of all parties to the reorganization proceedings, the district judge and the circuit court of appeals. We see no reason to burden the court with detailed rejoinder to petitioner's misstatements and false insinuations, since it seems clear that the petition for certiorari shows no adequate justification for a review by this court of the judgment rendered by the circuit court of appeals.

Respectfully submitted,

BERNARD NATH,
ISAAC E. FERGUSON,
of Chicago, Illinois,
attorneys for George W. Rossetter, Jay C. McCord and Maurice A. Rosenthal, as trustees,
respondents.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

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Petitioner

vs.

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Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

LLOYD C. WHITMAN,
Attorney for F. Gerald Thomas, Petitioner.

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REPLY BRIEF FOR PETITIONER.

"Statement of the Case."

(Brief for Respondents, 1-3)

It is untrue (Respondents' Brief, p. 2, lines 10-12, 21) that petitioner "flagrantly and persistently disregarded the injunction order ever since it was entered," or "brazenly continued to flaunt the injunction."

Petitioner was first charged with violation of the injunction in the trustees petition of June 17, 1940 (Trans. 7497, pp. 17-27), on which the decretal order of August 6, 1940 (Trans. 7497, pp. 159-163), was entered. *In re 4145 Broadway Hotel Co.*, 117 Fed. 2nd. 639. That petition did not allege or identify a single act of your petitioner as done on or after May 26, 1938, and prior to June 23, 1938, on which latter date your petitioner contends the injunction had already expired. The various letters of petitioner attached to the petition as exhibits are dated on or after May 8, 1940 (Exhs. A, C, E, F, G and N, Trans. 7763, pp. 28, 37, 43-46), all of them, in the language of *Bakers Share Corp.* v. *London Terrace, Inc.*, 130 Fed. 2nd. 157 (C.C.A. 2, 1942), " 'subsequent transactions' between the parties". And no act of appellant found in the court's separate findings (*Idem.* pp. 150-158) or in the decretal order itself (*Idem.* pp. 159-163) is found to have been committed by Thomas prior to June 23, 1938 or prior to May 1, 1939.

The second and only other charges of contempt, the acts for which your petitioner is now committed to jail, are acts of your petitioner in 1941 (Our Orig. Br. 30; C.C.A. Op., R. 69, lines 2-12; Trans. 7763, pp. 8, 9, 14-15, 27, 59).

It is untrue (Respondents' Brief p. 2, last four lines) that the record herein does not include "the evidence heard by the district court on the petition to punish him (petitioner) for contempt" (Trans. 7763, pp. 64-94; ordered to stand as of record in C.C.A. cases 7888 and 7891, R. 65).

It is untrue (Respondents' Br. p. 3, lines 2-3) that your petitioner "submitted nothing to the reviewing court in challenge of the justice of the order appealed from, or the fairness of the punishment imposed upon him;" and untrue (Respondents' Brief, p. 4, lines 12-6

from bottom) that "appellant raises no question regarding his guilt, but only the question of whether the District Court had jurisdiction to punish him for his violations of the injunction order". Petitioner shows that he never violated the injunction of May 26, 1938, that he was never guilty of any contempt of court and that there was never an act of his for which the court could rightly or justly visit any punishment upon him.

Counsel's statement of the jurisdictional questions (Respondents' Brief p. 3, lines 6-18) is studiedly wrong, —intended to confuse issues they advisedly avoid discussing. See, Our Original Brief pages 46-59.

"Former Adjudications."
(Brief for Respondents, i, 3-4)

Though not questioning that lack of jurisdiction of the subject matter can never be waived and that it is the province of the reviewing Court to determine the trial court's jurisdiction (Our Orig. Brief 41), counsel present (Their Brief, p. 3) another man of straw, namely, that on June 23, 1938, your petitioner moved to "modify" the injunction order of May 26, 1938.

Although otherwise stated by the court in its findings of fact (R. 18, par. 5), there was no motion to "modify" the injunction but a motion to dissolve the injunction. Hearing on that motion started June 22, 1938 (Trans. 6696, p. 68) and continued on June 23, 1938 (Trans. p. 72). Motion denied June 23, 1938 (Trans. 36). Petition for appeal from the injunction of May 26, 1938, was filed June 24, 1938 (Trans. 6696, p. 88).

On that appeal your petitioner's then counsel contended that the order of May 26, 1938, "permanently" enjoining and restraining Thomas "until the further order of this court" (Trans. 7497, p. 10) was a permanent

injunction and therefore beyond the jurisdiction of the trial court. Contrariwise, the trustees insisted (Trans. 7763, p. 50) that the injunction was merely a temporary injunction to preserve the *status quo* of the Thomas proceedings. The Circuit Court of Appeals, **sustaining the trustees' contention**, held that the injunction was a mere temporary injunction to preserve the *status quo* pending contemplated appeal by your petitioner from the order of May 23, 1938, denying your petitioner leave to file his proposed second amended petition. *In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7, 8-9 (See, also, petition for rehearing R. 90-91).

Rehearing having been denied December 14, 1938, by the Circuit Court of Appeals, on February 14, 1939 (R. 36), your petitioner, by his present counsel, petitioned the trial court to vacate the injunction of May 26, 1938, or otherwise hold it for nought (Our Orig. Br., 28, last par.) on the ground that **under the Circuit Court of Appeals decision** the injunction had expired at midnight June 22, 1938. That contention has remained your petitioner's contention ever since.

Another "straw man": Counsel state (Their Br., 4, 1st 3 lines) that no time since April 27, 1939, when the Circuit Court of Appeals denied your petitioner leave to appeal from the refusal of the District Court to vacate or hold for nought the injunction of May 26, 1938, "has the petitioner seen fit to request the District Court to dissolve or modify the injunction order of May 26, 1938." This is another misstatement.

May 3, 1941 (Trans. 7763, p. 47), in answer to the trustees' petition of April 18, 1941 (Trans. 7763, p. 6), upon which your petitioner was committed December, 1941, for contempt of court (R. 46), your petitioner urged in detail and at length (Trans. 7763, pp. 48-53) his

position and the reason for his position that the injunction of May 26, 1938, expired or ceased to be effective at midnight June 22, 1938; and plead (Trans. 7763, p. 53, lines 6-10) "that as to the order herein of March 20, 1939 [denying petitioner's petition of February 14, 1939, to the trial court to vacate the injunction of May 26, 1938, or otherwise hold it for nought], on the petition of this respondent, this respondent refers to and adopts as a part hereof said petition filed herein by this respondent on or about said last-mentioned date,"—referring to his very petition of February 14, 1939.

And on November 26, 1941 (Trans. 7888, p. 13) your petitioner moved the court (1) to vacate the decretal order of August 6, 1940, and (2) vacate so much of said order as finds or decrees or is on the face of said order basis for finding or decree that the injunction order entered herein May 26, 1938, was on August 6, 1940, in full force and effect, that said Thomas had theretofore violated said injunction order of May 26, 1938, that said Thomas obtained powers of attorney through material misrepresentation, that powers of attorney obtained by said Thomas since May 26, 1938, were void and of no force or effect, etc., etc. (Trans. 7888, p. 14).

Tho not mentioned in their brief itself, in their summary of argument (Their Br. i, first par.) counsel say that by reason of the decision on the first appeal (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7), "the injunction order itself is no longer open to review."

If so that decision is conclusive not only as to the propriety of the entry of the injunction of May 26, 1938, but as to the nature and effect of that injunction and as to the factual and legal premises of the court upon which it rested its conclusion. And if that is so the injunction restrained petitioner only while appeal from the order of May 26, 1938, was possible (Our Orig. Br. 45-48).

23,

And on this premise of counsel for respondent there is a direct conflict between that decision of the Circuit Court of Appeals and its subsequent decision on the same issues and between the same parties.

And on counsel's same premise, neither the trial court nor the Circuit Court of Appeals had power thereafter to reverse or modify the decision on the first appeal upon any of the subsequent appeals.

The only alternative is that the decisions of the lower courts, whether of the trial court or of the Court of Appeals, are not binding on this Honorable Court (*White* v. *Higgins,* 116 Fed. 2nd. 312, 317); and this Honorable Court has power now to do complete justice in the premises to your petitioner (Our Orig. Br. p. 41).

But the decision of the Circuit Court of Appeals on the first appeal (100 Fed. 2nd 7) cannot be counted upon in support of the contention that the District Court had jurisdiction to award the injunction of May 26, 1938, **as since construed** by the District Court and by the Circuit Court of Appeals for very fact that on the first appeal the Circuit Court of Appeals construed the injunction otherwise **and affirmed the injunction only as so construed on the first appeal.**

"No reason for allowance of certiorari."
(Brief for Respondents, 4-6)

"Reasons Relied on for Allowance of the Writ."
(Our Orig. Brief, 12-14)

If, as counsel assert (Their Brief p. 6, first 3 lines), "the jurisdiction exercised in bankruptcy case No. 56875 since 1935 all traces back to the initiative of F. Gerald Thomas", why from November 1935, to January 24, 1938, when the petitioner first moved for leave to intervene (Our Orig. Br. 22), was no final decree entered?

The fact is that from May 23, 1938, when the District Court dened petitioner leave to intervene (Our Orig. Br. 26), the claimed jurisdiction exercised in the bankruptcy case **"all traces back to"** the determination of respondents and of the trial court not to let F. Gerald Thomas initiate or do anything **either in or out of court** (Our Orig. Br. 35).

The long course of the instant litigation finally puts to the final touch the issue of the jurisdiction of the bankruptcy court in reorganization proceedings after confirmation of the plan of reorganization, and forces the Circuit Court of Appeals for the Seventh Circuit to lengths to sustain the claimed jurisdiction to which no other court in the land has gone. Result, the absurd "operation" theory (Our Orig. Br. pp. 52-54).

The public importance of the Circuit Court of Appeals absurd "operation" theory is emphasized by the decision, January 8, 1943, of the Circuit Court of Appeals for the Second Circuit in *In re Flatbush Avenue-Nevins Street Corporation,* not yet reported. That court holds that no reservations in the order confirming plan of reorganization gives the Bankruptcy Court any jurisdiction with reference to a voting trust, provided for in the plan, to pass upon "subsequent transactions" between the parties. That decision is not only in direct conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit of which we complain but demonstrates the untold confusion created and endless litigation invited by the last decision herein of the Circuit Court of Appeals for the Seventh Circuit.

According to the decision of the Circuit Court of Appeals of the Second Circuit, the trust involved in the instant case was, admittedly (Trans. 7497, p. 86, 3rd from

last par.), terminated as of May 1, 1939. Yet here we are in 1943 petitioner and his principals deprived of their guaranteed civil rights, their rights of contract, of property, of free speech and of due process by perpetuation of claimed power, denounced by the Circuit Court of Appeals for the Second Circuit, "to remain" to quote that court, "a wet nurse to the reorganized company."

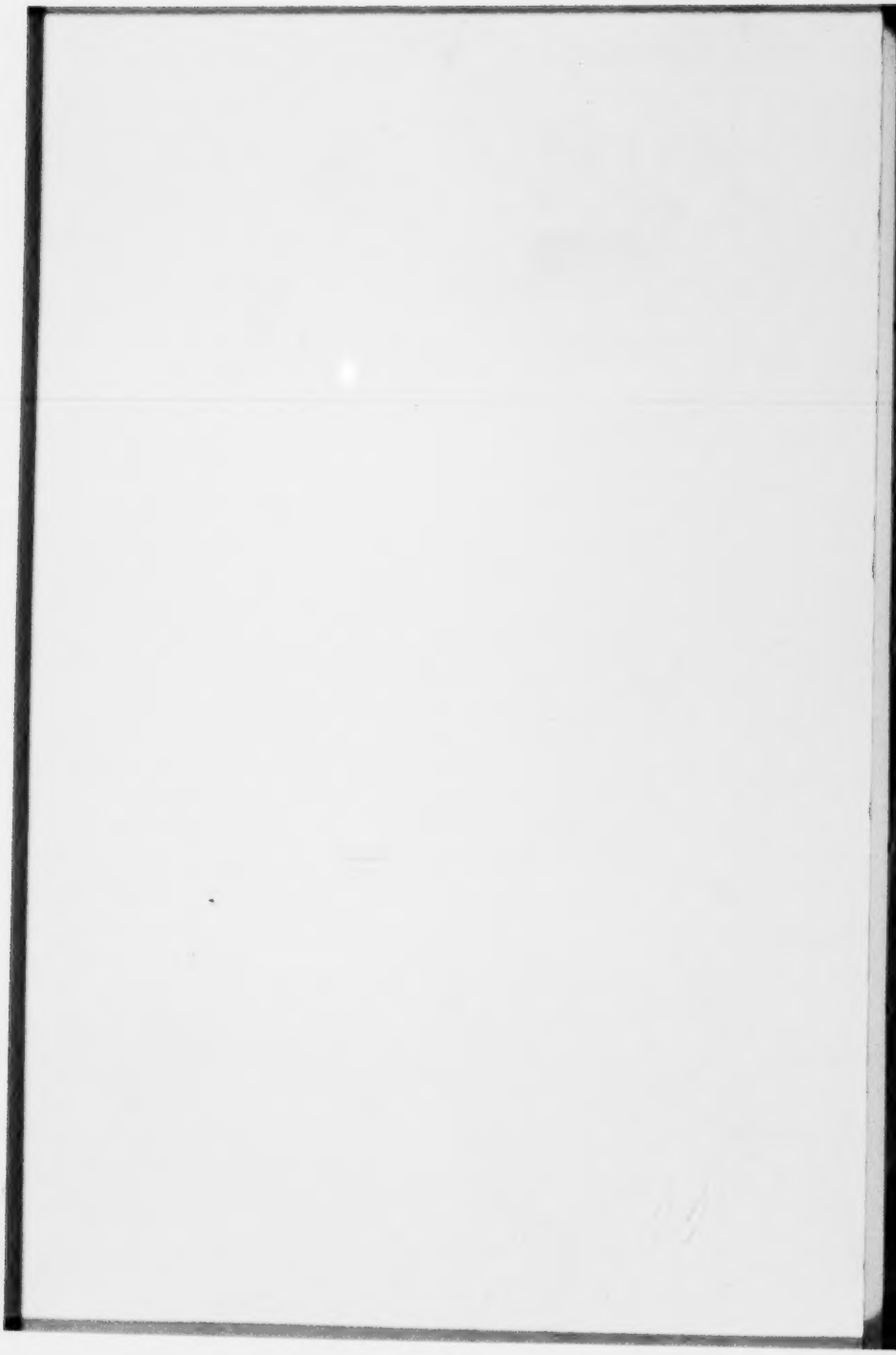
Conclusion.

And in the instant case how "wet" a nurse! Your petitioner may not intervene and be heard in the bankruptcy court, **has no rights in court** (Our Orig. Br. 35). On the sole ground that on April 27, 1938, your petitioner, while his motion for leave to file his second amended petition was pending, but before any restraining order or injunction issued, had written his clients petitioner's letter of April 27, 1938 (Trans. 6696, pp. 5-8), your petitioner is declared and decreed (as the injunction of May 26, 1938, is now construed by the Circuit Court of Appeals) to have **no rights out of court,** his guaranteed civil rights to the contrary notwithstanding. And for how long? Until in its discretion, save the mark, the District Court decides that it is no longer necessary to muzzle petitioner because of his letter of April 27, 1938! Until then, your petitioner is immured in the District Court for the Northern District of Illinois, Eastern Division, sitting in bankruptcy.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.



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Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION OF CHICAGO CIVIL LIBERTIES COMMITTEE

To be heard Amicus Curiae in support of Petition for Certiorari.

CHARLES LIEBMAN,
Counsel for Chicago Civil Liberties Committee.

In The

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THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

F. GERALD THOMAS,

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION OF CHICAGO CIVIL LIBERTIES COMMITTEE FOR LEAVE AS AMICUS CURIAE TO SUPPORT THE PETITION FOR WRIT OF CERTIORARI FILED BY F. GERALD THOMAS.

The Chicago Civil Liberties Committee, by Charles Liebman, its attorney, moves for leave to be heard herein as *amicus curiae* in support of the petition for writ of certiorari. The interest of the Chicago Civil Liberties

Committee in this matter, and the reasons for which it requests the Court to grant certiorari herein are as follows:

I.

1. The Chicago Civil Liberties Committee is an Illinois not-for-profit corporation, organized for and interested in the protection of civil rights, including the rights of uninhibited dissemination of information and opinion as guaranteed by the First and Fourteenth Amendments to the Constitution.

2. The petitioner for certiorari has been sentenced to imprisonment for a contempt of court consisting of a violation of an injunction restraining him from communicating information and opinion to other persons.

3. The gravamen of his offense as stated in the order imposing the punishment (Trans. 7888, pages 46-47) is that he wilfully, deliberately and defiantly *disobeyed the injunction order* (Trans. 7888, page 46, par. 2).

4. The order for punishment refers to findings of fact and conclusions of law previously made, but does not specify which findings of fact and conclusions of law (Trans. 7888, pages 15-27), constituted the contempt or how they constituted a contempt.

II.

5. Traditionally, the struggle for freedom of speech has been primarily a struggle against prior limitation upon the right to publish, enforced by punishment not for the evil inherent in the publication itself, but for the violation of the prohibition against publication. The balancing of social conveniences as between the inhibition of potentially harmful publication on the one side, and the general desirability of free interchange of opinion and

information on the other hand (subject to punitive sanctions after the fact, if the expression of opinion or information violates some positive rule of law), has invariably led temperate and thoughtful men to choose the latter alternative. The inhibitory sanction has universally been used as a cloak for oppression, and as a device for maintaining injustices and for forestalling corrective action.

6. The use of the injunctive process against communication between persons desiring to exchange information and opinion about their pecuniary interests in property which is involved in litigation appears to have been invented in connection with bankruptcy reorganization jurisdiction created by the various Bankruptcy Reorganization Statutes of 1933 and subsequently. The theory of the injunction against communication derives from that school of thought which assumed that the bankruptcy reorganization jurisdiction was "revolutionary", in the sense that basic principles of fair play which had previously governed in the determination of the relation of conflicting interests, were swept aside. The outstanding example of this concept was the position universally assumed by the District Courts, and by many of the Circuit Courts of Appeal, that the principles of the *Boyd* case (*Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 S. Ct. 554) had been nullified by the reorganization statutes, and that in a bankruptcy reorganization secured creditors might have their security taken away from them and turned over in part to junior interests, without consideration or compensation. This concept was not destroyed by this Court until 1939 when in *Case* v. *Los Angeles Lumber Products Co*, 307 U. S. 619, 59 S. Ct. 1030, the Court held in effect that the principles of the *Boyd* case involved fundamental due process and governed in all bankruptcy reorganizations.

7. The possibilities of the use of the injunctive process as a means of oppression and overreaching have been so well illustrated in the labor injunction cases that it seems hardly necessary to expand further on this point. We point out that even if the injunctive process be allowed, only those acts ought to be subject to injunction which would in themselves amount to contempts of court in the absence of injunction. This being the case, the injunction process becomes superfluous; considering its unsavory background and the inherent probability of abuse, it ought not to be sanctioned. So far as the dissemination of information and opinion is concerned, there seems to us to be no substantial difference between the respective positions of (1) bondholders attempting to communicate between themselves concerning their rights; (2) labor union organizations attempting to communicate with potential labor union members to induce them to join unions; (3) union members seeking to inform the public that they have a grievance against an employer, and (4) members of a religious sect seeking to make proselytes by oral argument by handing out their literature. In situations (2), (3) and (4) this Court has recognized that the due process clause of the Fourteenth Amendment embraces the First Amendment, as against inhibitory action by the States. In the case at bar, the First Amendment ought to bar the right of a United States court by injunctive process to prohibit the dissemination of information and opinion; and then to punish for such dissemination as it has in the instant case, not for any inherent vice or criminality in the information and opinion transmitted, but for a contempt of court which arises solely out of the disobedience of the injunction order.

III.

CONCLUSION.

The Chicago Civil Liberties Committee submits that the question of the right of a court to restrain dissemination of information and opinion by injunction; the question, if such right exists, of the proper scope of the injunction, of the nature of the acts which may constitute violations of such an injunction, and of the nature of the punishment to be imposed, are of such widespread importance that this Court, as a court of law, ought to take this case on certiorari, examine the questions involved and lay down principles for the guidance of the inferior courts in regard to such matters in the future.

Respectfully submitted,

CHARLES LIEBMAN,
Attorney for Chicago Civil Liberties Committee.

(13)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

F. GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

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Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING, AND RELATED MOTION.

LLOYD C. WHITMAN,
Attorney for F. Gerald Thomas, Petitioner.

Midwest Law Printing Company
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Chicago, Illinois

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IN THE

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING, AND RELATED MOTION.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now petitioner, F. Gerald Thomas, personally and by Lloyd C. Whitman, his attorney, and moves the Court to vacate and set aside its orders herein of February 15, 1943, and reconsider the petition herein for writs of certiorari; and that the Court herein order, in effect but in such terms as may please the Court, that until otherwise ordered by this Court your petitioner and all other stockholders of 4145 Broadway Hotel Company, may communicate with one another and freely participate to the full of their rights and privileges under the terms of the reorganization trust agreement herein in the referendum as of May 1, 1943, instituted by the respondent trustees herein February 26, 1943, and now going on under said trust agreement, as shown by affidavit of F. Gerald Thomas duly filed herein [attached hereto], without limitation or restraint by or under the terms of provisions of the injunction herein entered May 26, 1938, or of any other findings, orders or decrees herein of the District Court, and without prejudice to claim of petitioner or any other stockholder that said trust was terminated in 1939, or that said trustees were removed in 1940.

And in support of the foregoing motions your petitioner respectfully represents:

Prior Denial of Certiorari. Denial of writ of certiorari to petitioner in case No. 1041, October Term, 1940, is no obstacle to granting writs herein although some of the questions herein raised were sought to be raised in case No. 1041. *Atlantic Coast Line* v. *Powe*, 283 U. S. 401, 403-404.

Prior Decisions herein of CCA. Decisions of the Circuit Court of Appeals prior to its orders of July 18, 1942 (R. 72), reversal of which is now sought, do not now, in this Honorable Court, constitute law of the case on the instant application. *White* v. *Higgins,* 116 Fed. 2nd. 312, 317.

Preservation of Certain Issues. In the instant case your petitioner anew moved the trial court to vacate or otherwise hold for nought the injunction of May 26, 1938; and moved the court to vacate the decretal order of August 6, 1940, as a whole and piece by piece (Our Reply Brief, 4-5).

If Ever Effective, Injunction Expired June 22, 1938. In its first decision (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7) the Circuit Court of Appeals **demonstrated from the incontrovertible record to like effect** (Proceedings of May 23, 1938, Appendix, Our Orig. Br. 73-79) that the injunction of May 26, 1938 (Trans. 7497, pp. 10-11) was merely to preserve the *status quo* of the Thomas proceedings pending possible appeal by him from the order of May 23, 1938.

February 16, 1943, in its cases Nos. 7888 and 7891, the Circuit Court of Appeals ordered

> "Mandate stayed further **until Supreme Court disposes of petitions for rehearing** on order denying certiorari."

If no petition for rehearing were filed in this Honorable Court within 25 days of this Court's denial of certiorari herein, **would these stay orders of February 16, 1943, remain in effect until expressly vacated or declared for nought by orders of the Circuit Court of Appeals?**

May 26, 1938, the District Court enjoined petitioner from communicating with his associates or using his powers of

attorney **pending appeal from the order of May 23, 1938** (Our Orig. Br. 45). Legal possibility of appeal from that order expired at midnight, June 22, 1938, without appeal having been taken. **Did the injunction nevertheless remain in effect until expressly vacated or declared for nought by order of the District Court?**

Freedom of Speech.

(1) But the injunction of May 26, 1938, was still-born,—was void *ab initio*.

When the injunction was entered in 1938, the District Court could not enjoin what was not in contemplation until 1939, 1940 and 1941,—certainly could not enjoin participation in the referendum (now going on) as of May 1, 1943. *Near* v. *Minnesota, ex rel. Olsen,* 283 U. S. 697, 75 L. ed. 1357, 1366-1367.

Even tho petitioner serve ninety days in the County Jail, he still remains muzzled,—**stands today and will remain through the coming tomorrows, prohibited from communicating with other stockholders in the affair of the referendum as of May 1, 1943, commenced by respondents since denial of certiorari herein, or in any other of the corporate affairs.**

Silence coerced by law (Our Orig. Br. 27-28, 35-36, 38) is the argument of force in its worst form. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287, 302, 308.

(2) As pointed out by the Chicago Civil Liberties Committee (Their Motion p. 3), restraint of freedom of speech directed by injunction against *future* communications is peculiarly the child and tool of the bankruptcy courts, and is based on theory contrary to *Case* v. *Los Angeles Lumber Products Co.,* 307 U. S. 619, 59 S. Ct. 1030.

(3) If the acts which are the bases of injunction and commitment do not constitute interference with the jurisdiction of the court, injunction and commitment violate the right of free speech. Constitution of the United States, First and Fourteenth Amendments. *Palko* v. *Connecticut*, 302 U. S. 319, 326-327. *Harry Bridges* v. *State of California*, 314 U. S. 252, 267, 86 L. ed. 192, 205-206.

(4) If valid at all, the injunction of May 26, 1938 (Trans. 7497, pp. 10-11) must be construed to refer only to matters within the jurisdiction of the District Court. Construed to refer and apply to communications between petitioner Thomas and other stockholders on matters not within the court's jurisdiction it violates the right of free speech.

As of May 1, 1937, and every two years thereafter, to and including May 1, 1943, the Trust Agreement requires the trustees to conduct referendums to determine whether the Trust Agreement shall terminate, the referendum to be conducted at a meeting or by mail (Trust Agreement, Art. VII, Sec. 1, Trans. 7497, pp. 146-147). Stockholders may vote in person or by attorney in fact appointed in writing (Trust Agreement, Art. VIII, Trans. 7497, p. 147). **Thus the right to terminate or continue the trust is vested in the stockholders, not in the court.** The injunction of May 26, 1938, was based solely on the facts that petitioner sent out his letter of April 27, 1938 (Trans. 6696, pp. 5-7; reprinted as Appendix hereto), not on the ground that any statement in that letter was untrue or uncalled for but that the letter did not refer to possible future action by stockholders under the trust agreement but to the pending motion of Thomas for leave to file his proposed second amended petition (Proceedings of May 23, 1938, Trans. 6696, p. 63, lines 9-18, p. 64, first four lines; Appendix Our

Orig. Br. 74, lines 2-12, p. 75, first seven lines; proceedings of June 22, 1938, Trans. 6696, pp. 69-70, last 4 lines, p. 71, lines 16-18 from bot.).

And the acts of petitioner which are the bases of committing him for contempt are letters of March 15, 1941, March 17, 1941, and April 5, 1941 (Trans. 7763, pp. 25, 27-31, 59-64), each and all of which relate solely to the referendum of May 1, 1941. That referendum under the reorganization Trust Agreement was not matter within the jurisdiction of the District Court but matter solely the affair of the stockholders. **As to that affair and as to the affair of the referendum as of May 1, 1943, now going on, your petitioner and the other stockholders have constitutional right freely to communicate with one another**

(5) Freedom of speech is of general and vital importance. It "lies at the foundation of free government by free men" (*Schneider* v. *New Jersey,* 308 U. S. 147, 161), "A fundamental principle of * * * justice" (*Twining* v. *New Jersey,* 211 U. S. 78, 106), "it is the matrix, the indispensable condition, of nearly every other form of freedom". If sacrificed, "neither liberty nor justice would exist". *Palko* v. *Connecticut,* 302 U. S. 319, 326-327.

Vital Importance of Further Jurisdictional Questions.

The District Courts sitting in bankruptcy are courts of limited jurisdiction (*Chicot - County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371, 376), but their functions are such that the scope of their jurisdiction must always be matter of general public interest,—**herein matter of special nation-wide concern in that herein the misclaimed jurisdiction is utilized to deny your petitioner and associates freedom of speech.**

Prejudicial Inconsistencies and Unwarranted Findings and Statements of the Lower Courts.

The findings, orders, opinions and decisions herein of the District Court and of the Circuit Court of Appeals are a jungle of prejudicial, unfounded and inconsistent findings and rulings, together expressive of the penchant of the bankruptcy courts for restraining future communications between mutually interested parties,—"child and tool", says the Chicago Civil Liberties Committee (Their Motion, p. 3), of our bankruptcy courts. Small wonder, to paraphrase Captain Edward V. Rickenbacker, that freedom of speech is diminishing,—"smeared" to death by misleading and libelous statements of its enemies.

(1) The highly prejudicial statement of the Circuit Court of Appeals on the second appeal (*In re 4145 Broadway Hotel Company*, 117 Fed. 2nd. 639, 1st col.) that the trial court entered the injunction of May 26, 1938 (to quote),

> "Because it appeared to the court that the charges [by Thomas] were made for the purpose of compelling the trustees to enter into a lease with his client so that he could obtain commissions thereon, * * *"

is untrue.

This statement of the Court of Appeals flatly contradicts the order of May 26, 1938, which itself recites the reasons for the entry of the order and recites nothing of the kind (Trans. 7497, pp. 10-11). It is conclusively negatived by the record of the proceedings of May 23, 1938 (Trans. 6696, pp. 62-67; reprinted Appendix, Our Orig. Br. 73-79). It is based wholly upon unsupported charge by respondents, on mere information and belief (Respondents' petition of May 5, 1938, Trans. 6696, p. 3, 2nd par.), denied under oath by your petitioner (Reply of May 16, 1938, Trans. 6696, p. 9, par. numbered 5, copied into the

preliminary restraining order of May 5, 1938, which itself prefaces its recital with **"it appearing from said petition"**.

(2) The prejudicial statement of the Circuit Court of Appeals on the second appeal (*In re 4145 Broadway Hotel Company,* 117 Fed. 2nd. 639, 641) that it found "ample evidence in the record" to sustain the charge by respondents that petitioner obtained his powers of attorney by "misrepresentation" **is untrue.**

See our original brief, pages 30-31, and our petition for rehearing herein in the Court of Appeals (R. 87, par. 1).

(3) The statement of the Circuit Court of Appeals on the second appeal (117 Fed. 2nd. 639, 2nd. col.) that by the District Court's decretal order of August 6, 1940, the injunction of May 26, 1938, was "continued in effect" is **untrue.**

In the decretal order of August 6, 1940 (Finding, Trans. 7497, p. 61, par. numbered 9), the District Court did not decree but **merely erroneously held** that the injunction of May 26, 1938, "has been ever since said date and remains at the date hereof in full force and effect".

(4) That the finding of the Circuit Court of Appeals on the first appeal (100 Fed. 2nd. 7, 9 par. 5) that petitioner was not coerced to consent to be enjoined pending the possible contemplated appeal **is untrue** is established beyond room for dispute by the record herein (Proceedings of May 23, 1938, Trans. 6696, pp. 62-67; reprinted, Appendix to Our Orig. Br. 73-79).

(5) On the first appeal (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7, 8-9) in order to demonstrate that the injunction was not a permanent injunction and therefore, as appellant Thomas claimed, beyond the jurisdiction of the District Court, the Circuit Court of Appeals resorted to and relied upon the record *aliunde* the face of the injunction itself, to wit, the proceedings of May 23, 1938 (Appendix, Our Orig. Br. 73-79); accordingly held (Op. 8, 2nd. col.) that the injunction restrained your petitioner "until the disposal of the contemplated appeal from his [the District Court's] order denying permission to file the second amended petition"; and pointedly concluded (Op. 10),

> "We conclude that we cannot disturb the injunctive order complained of, but in so holding we are not passing upon the right of the appellant, or any other certificate holder, to take any proper action in the future which is authorized by the terms of the trust agreement."

On the second appeal (*In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd. 639, 641, par. 1) the Circuit Court of Appeals held that the injunction was not of the nature or limited as held on the first appeal, **on the sole ground,** to quote the court, that

> "We find no such limitation **in the order.**"

(6) *Per Curiam,* April 27, 1938 (130 Fed. 2nd. 487, 488), the Court of Appeals stated that when the injunction should be dissolved was

> "within the discretion of the District Court".

No authority for ignoring the record *aliunde* the face of the order of injunction (Compare our Orig. Br. 45, 1st par. and authorities cited) and holding that the face of the order controlled, or for the ruling that the injunction remained in effect after midnight, June 22, 1938 (Compare, *Sweeney* v. *Hanley,* 126 Fed. 97, 99; cert. den. 183 U. S. 700), and until dissolved "in the discretion of the District Court" has ever been cited by court or by counsel in the whole course of this litigation.

Witting or unwitting, such misstatements of fact and triflings with established rules of law serve like ends as Hitler's hate-stirring denunciations of other races.— Eternal vigilance is the price to all of us of immunity from influence by such tactics.

Jurisdiction of the Bankruptcy Courts under Section 207 Par. (f).

The real, really the only issue as to the jurisdiction of the Bankruptcy Courts as such is as to their jurisdiction under Section 207, 11 U. S. C. A., Par. (f).

(1) What the Circuit Court of Appeals has to say (Opinion, R. 70) about reservations in the order of confirmation of the plan of reorganization is mere stop-gap.

Question of consistency or inconsistency of the so-called "reservations" with the plan of reorganization and the Bankruptcy Act was first raised in the instant case (See, Our Orig. Brief, 24-26, 57-58), and was never discussed or alluded to in any opinion of the Court of Appeals prior to its opinion of July 18, 1942 (R. 68-71). Respondents themselves have never ventured any discussion of that issue. And all that the Court of Appeals has to say on the subject in its last opinion (R. 70) is,

> "As our former opinions disclose, the proposed plan of reorganization and the reservations contained in the court jurisdiction to enter **the injunction order.**"

To enter what injunction? Why, **the injunction order as construed on the first appeal** (100 Fed. 2nd. 7).

And the Court of Appeals did not hold on the first appeal that the District Court had jurisdiction to entertain petitioner's proposed second amended petition, but only that it had "jurisdiction to entertain appellant's motion for leave to file the amended petition". *In re 4145 Broadway Hotel Co.,* 100 Fed. 2nd. 7, 9. Then, on the ground that the recited consent was a real not a coerced consent, the court held that the only question was of the jurisdiction of the District Court **so** to enjoin petitioner. Thus the court avoided question whether entry of the injunction was an abuse of discretion because the District Court, as the District Court itself held by its order of May 23, 1938 (Trans. 6696, p. 57), did not have jurisdiction to entertain the second amended petition itself. See, *U. S. et al.* v. *Corrick et al.,* 298 U. S. 435, 437-438, 8 L. ed. 1263, 1266.

(2) What the Court of Appeals has to say (Op. R. 70) of powers of the bankruptcy courts under Section 207, paragraph (f) is of like ilk, only more so; for, whatever such powers be they are conditioned on acceptance by creditors and none of the so-called reservations were ever submitted to creditors.

(3) Thus it is that the Court of Appeals is driven to read "put into effect and carry out the plan" of paragraph (h) of Section 207 as "to **operate * * * the property** dealt with by the plan"!

The Court of Appeasl expressly rests its decision on this construction of paragraph (h), declaring that the clear import of the injunction was to prevent interference "with the **operation** * * * of the plan as confirmed" (Opinion, R. 70, last 7 lines).

We are not unmindful that this Court reviews decisions not opinions, but it is significant that the Court of Appeals' major premise for its decision herein is this important and revolutionary construction of the Bankruptcy Act, and in respects never before passed upon by this Honorable Court.

And do not persistent inexcusable misstatements of fact, repeated patently erroneous rulings of law, without color of authority and arrived at by ignoring abundant contrary decisions, and resultant Dreyfussian injustice to the litigant at sacrifice of his constitutional rights amount to departures (Rule 38, par. 5b) "from the accepted and usual course of judicial proceedings", or to sanction of "such a departure by a lower court"? If not, it must be because denial to a litigant of *bona fide* hearing and judgment on his cause, is not such a departure.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.

I the undersigned Lloyd C. Whitman hereby certify that the above petition for rehearing of petitioner F. Gerald Thomas, and related motions the matter presented in support thereof are presented in good faith and not for delay.

LLOYD C. WHITMAN,
Counsel for Petitioner.

State of Illinois,
County of Cook—ss.

F. Gerald Thomas, affiant, being first duly sworn, says that under date February 26, 1943, the respondent trustees herein instituted referendum by mail as of May 1, 1943, under and pursuant to the provisions of the reorganization trust agreement touching the capital stock of 4145 Broadway Hotel Company, a corporation, to determine by vote of stockholders whether the trust created by said trust agreement shall be terminated as of May 1, 1943, or continued until May 1, 1945; that said referendum is now going on and in that connection said trustees are circularizing stockholders by mail.

F. GERALD THOMAS,
Affiant.

Subscribed and sworn to before me
in my County this 9th day of March,
1943.

Catherine Dee,
Notary Public in and for
Cook County, Illinois.

APPENDIX.

Members
Chicago Real Estate Board
National Assn. of Real Estate Boards
Chicago Fire Underwriters Assn.

THOMAS & FITZPATRICK
REALTORS
155 North Clark Street
CHICAGO, ILL.

April 27, 1938

To: Holders of Stock Or Participating Certificates in the "4145 Broadway Hotel Company".

Records of the above named Corporation show that your stock is being held by three Trustees, namely, George W. Rossetter, Jay C. McCord and M. A. Rosenthal.

In 1929, the Circuit Court of Cook County, Illinois, appointed a Receiver for the Flanders Apt. Hotel Co. which is the same property as that named herein. The active management of the property, however, in effect, remained with individuals connected with S. W. Straus & Co. until about one year ago when management was taken over by the Securities Service Corporation, also owned and controlled by former officers or employees of the now defunct S. W. Straus & Co.

On March 11, 1931, S. W. Straus & Co. soliciting your deposit of bonds, wrote the bondholders to the effect that the Bondholders' Committee would make no charge for its services and on September 28th, 1931 after nearly all bonds had been deposited, the then Committee urged the deposit of remaining bonds saying the Committee had agreed to act without compensation. Subsequently the Court awarded them pay for services.

On **March 23, 1932** the Committee **showed $56,755 due on taxes** and on **January 23, 1934** the Committee among other things informed you that **taxes due amounted to $95,-173.75.** On March 7, 1935 the United States Court confirmed a Plan of Reorganization and appointed the then Bondholders' Committee as Trustees, to control your property for 10 years and at the same time the Court ordered said Trustees to file reports each calendar year. They did not file any reports until January 18, 1938 at which time I properly called the Courts' attention to it and they were given leave to file those reports within fifteen days.

Briefly those reports show as follows:

A Net Loss From July 29, 1935 to December 31, 1935 of $9,786.53.

A Net Loss for the Year Ending December 31, 1936 of $26,453.36.

A Net Loss for the Year Ending December 31, 1937 of $23,282.15.

and that **the unpaid taxes then amounted (including 1937) to $234,665.22** and that they have on hand over $47,500 and yet allow tax **penalties alone to increase during 1937 at the rate of over $2000 per month.**

The Receiver petitioning the State Court says he did not act as receiver after March 7, 1935. The Trustees say they did not take possession of the property until July 29, 1935. In the interim, the property was being managed by a former officer of S. W. Straus & Co. The Trustees appointed are **not under bond.** In my opinion, it is gross negligence on the part of said Trustees to defer taking possession of the property for over four months after they were appointed. In view of the extremely poor showing,

is it any wonder that the Trustees did not file reports in Court as ordered for over two years?

Under present market conditions what was an original bond investment of $1,000 was sold for about $25.00. Do you wonder at such a price when you look at the record of this property under its present and past management and see that the taxes alone amount to $234,665.22 plus ever increasing penalties and prior liens all to be paid before **you** can realize anything more than a pittance for your interest? How long do you think, under the present management, it will be before you can not realize even $25.00 for a $1000 original investment?

Do you still feel that you want the present Trustees to continue managing your property for 7 years more?

The Trustees have refused offers to lease the property on a guaranteed rental of $36,000 per year plus a percentage. **Why?**

I realize that there are approximately 1300 widely scattered stock or participating certificate holders throughout 38 States as well as in Portugal, Canada, Ireland, Philippine Islands and Canal Zone and that it is practically impossible for us to get together personally to protect our own interests.

The writer is a stockholder and for the past 12 years has been a licensed real estate broker in Illinois.

I am endeavoring to have the present Trustees **removed and if you agree with me that they should be removed, your cooperation is essential. There will be no charge to you for my services.** I am enclosing Power of Attorney, which will enable me to act for you but will not permit me to sell your stock or participating certificates. I hope that possibly something more than the past history and present

outlook seems to indicate, may be saved for the Certificate Holders if we can soon enough enter cooperating forces to exercise the fundamental control which lies with the Certificate Holders.

I am enclosing a self-addressed envelope for return of power of attorney which please sign and have witnessed by two persons and I shall be glad to have you write me if there is anything connected herewith which you do not understand and in any event, I will appreciate a reply.

Yours very truly,
F. Gerald Thomas.

FGT:C

P. S. If you have disposed of your Stock or Certificate, kindly furnish me name and address of purchaser.

(14)

Office - Supreme Court, U. S.
FILED
MAR 12 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

F. GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

F. GERALD THOMAS,

Petitioner

vs.

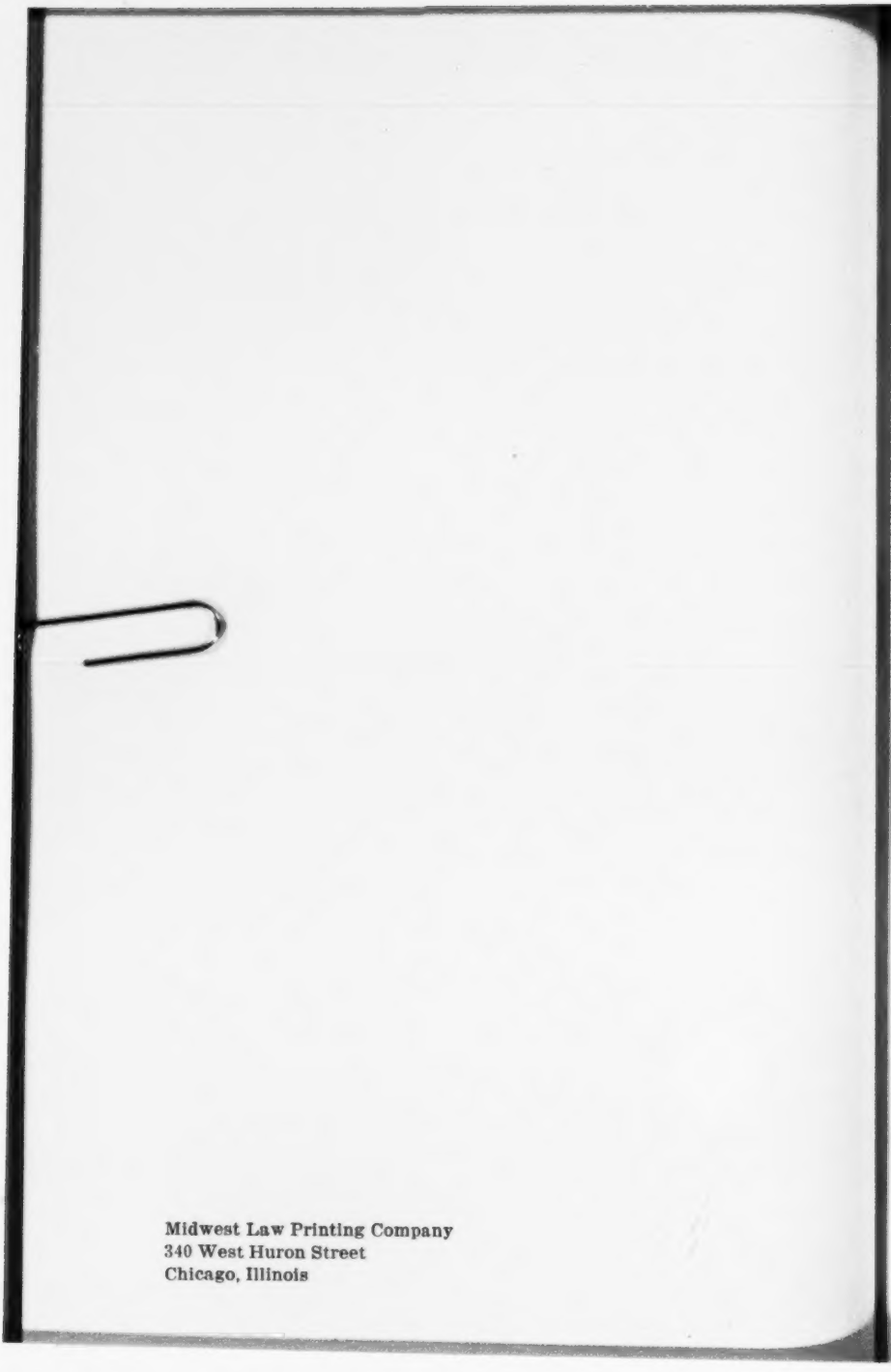
GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

SUGGESTIONS OF CHICAGO CIVIL LIBERTIES COMMITTEE AMICUS CURIAE IN SUPPORT OF PETITION TO RECONSIDER DENIAL OF CERTIORARI

CHARLES LIEBMAN,
Counsel for Chicago Civil Liberties Committee.



Midwest Law Printing Company
340 West Huron Street
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AMICUS CURIAE IN SUPPORT OF PETITION TO RECONSIDER DENIAL OF CERTIORARI

The Chicago Civil Liberties Committee supports the motion for reconsideration of the order denying certiorari in this case.

This court has clarified the law with regard to the powers of the District Courts and of the state courts relative to interference with the dissemination of information or opinion through the injunctive process. (*Near* v. *Minnesota ex rel. Olsen,* 283 U. S. 697, 75 L. ed. 1357.)

On March 1st, 1943, this court laid down rules for the guidance of the inferior Federal Courts with relation to the admission into evidence of confessions obtained while persons were held illegally. (*McNabb* v. *United States,* decided March 1, 1943; *Mitchell* v. *United States,* decided March 1, 1943.)

As was pointed out in the original petition for certiorari the rights and duties of the District Courts with relation to the entry of an injunction such as the one involved in this case are thought to be very uncertain (See Pet. for Certiorari, 54, 60). This court will undoubtedly at some future time take a case of this nature and lay down principles for guidance of the District Courts. Unless there exist compelling reasons to the contrary of which we are not aware we believe that this would be a proper case for the court to take and decide, to that end.

Respectfully submitted,

CHARLES LIEBMAN,
Counsel for Chicago Civil Liberties Committee.